SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 166.

THE MUTUAL LIFE INSURANCE COMPANY, *Petitioner*,

vs.

ELIZA MAUDE HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, AND EUGENE C. HILL, BY HIS GUARDIAN, EBEN SMITH, *Respondents.*

BRIEF OF RESPONDENTS.

STATEMENT.

This action is based on a policy of insurance on the life of George Dana Hill in favor of his wife, Ellen Kellogg Hill, if living, and in case of her prior death, then to the children of their bodies. The policy was issued on the 29th day of April, 1886, upon which one annual premium was paid shortly after the delivery of the policy.

On the 14th day of February, 1887, Mrs. Hill died, leaving surviving her, as children of their bodies, Eliza Maude, George E., Ellen Kellogg, and Eugene C. Hill. It will be noticed that Mrs. Hill died in less than one year after the policy was issued and before any subsequent premium was or could become due. Shortly after she died Eben Smith was appointed guardian of these respondents. George Hill,

the insured, died on the 4th day of December, 1890. Shortly after he died, notice and proofs of death were submitted to the company. The company denied liability on the sole ground that the policy was forfeited by non-payment of a premium on April 29, 1887. On the due date of the second premium, as mentioned in the policy (the day on which the company had right to demand premium by service of notice), the whole interest in the policy had become vested in the children. At that time all were minors, and were so at the time of the death of George Dana Hill, the insured. The policy provided that it was to be wholly performed in New York. The application also provided that "it was subject to the charter of the company and the laws of New York." It also provided that it was "agreed that the contract when made should be held and construed at all times and places to have been made in New York." At the time the policy was issued there was in force in New York a statute requiring the service of a prescribed notice as a condition precedent to an insurance company claiming or declaring a forfeiture of a policy of insurance. See Laws of 1876, amended 1877, chapter 321, in part as follows:

"No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual payment of premium or interest, or any portion thereof, except as hereinafter provided."

It provided, further, for the service of the notice not less than thirty nor more than sixty days prior to the due date of the premium as mentioned in the policy, and "in case the payment demanded by such notice shall be made within thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy, in respect to the payment of said premium or interest, *anything therein contained to the contrary notwithstanding.*"

It has been held over and over again, in New York and other States, that an insurance company could not defend on the ground of forfeiture for non-payment of premium until it had first shown that it had sent the statutory notice, and that the parties interested in the policy had not paid the premium within the thirty days specified. It was so held in the case of Baxter *vs.* Insurance Company, 119 N. Y., 450, and again in De Frace *vs.* Insurance Company, 136 N. Y., 145, 151, and in many other cases in New York and in other States.

The insurance company never claimed, and does not now claim, that it ever served or attempted to serve the statutory notice required by the law of New York mentioned, but defended on the ground, as stated by Justice Brewer of this court, in the former hearing of this case:

"It is alleged not only that the insured and the company agreed to abandon the contract, but also that the beneficiary, his wife, and the plaintiffs, their children, 'failed, neglected and refused' to pay the premium. So we have a case in which not only did the insured and the company abandon the contract but the beneficiaries neglected and refused to do that which was essential to keep the policy alive. The allegation in the answer does not disclose a mere omission, for it is 'neglected and refused,' and, of course, there can be no refusal unless with knowledge of the opportunity or duty. A party cannot be said to refuse to do a thing of which he knows nothing. Refusal implies demand, knowledge or notice. The case, therefore, is one in which the beneficiaries refused to continue the policy, while the insured and the company abandoned it."

At the first hearing the lower court held that the agreement alleged between the insured and the company was not binding upon the minor beneficiaries, and that the allegation of their refusal to pay the premium did not and could not excuse the company from serving the statutory notice as a condition precedent to their acquiring the right to for-

feit the contract. The lower court was affirmed by the circuit court of appeals.

Both courts were reversed by this court in the language above quoted.

The only question, we claim, left open by the mandate of this court was a submission of this question. When the case reached the lower court respondents denied each and all of the allegations above mentioned. Petitioner did not prove or offer to prove that respondents refused to pay the premium. It did not even attempt to prove that they had knowledge of the non-payment of the premium. It certainly was its duty under the opinion of the court to do so. It had the burden of proof. It was its duty to establish this affirmative defense. The petitioner not only failed to establish the defense that this court held good if proven, but made no attempt to do so. On the contrary, respondents did prove, *over the objection of petitioner*, they not only did not refuse to pay the premium, but did not know of the existence of the policy until after their father's death. (See Record, 81–8.) This brought them clearly within the decision of this court. In the language of the former opinion, "a party cannot be said to refuse to do a thing of which he knows nothing. Refusal implies demand, knowledge, or notice." Notwithstanding the fact there was no evidence to sustain the defense, but positive, uncontradicted evidence overthrowing it, the court nevertheless, giving the petitioner the benefit of every doubt, submitted the question to the jury in these words:

"One of the defenses set up in the defendant's answer is, that these plaintiffs neglected and refused to pay the premiums. A refusal on their part would constitute a complete bar of their right to recover in this case. If they have refused to pay the premium, then that amounts to a complete abrogation of the contract itself.

"Now a refusal implies an affirmative act with knowledge and with an opportunity to act. It is not synonymous with omission. A mere omission to pay the premium has

no such effect, but the defense that is interposed here is that these plaintiffs with knowledge that the premiums were due and were unpaid refused to pay them, and that is the question which I submit for you to decide, whether the evidence proves that there was any such affirmative act on the part of the plaintiffs in this case as would amount to a refusal to pay the premiums or whether there was any express contract or agreement since the delivery of the policy, which amounts to an agreement on their part to surrender the policy or abrogate the contract.

"There is another question which I submit to the jury, and that is whether Capt. Hill himself whose life was insured, abrogated this contract by any agreement on his part to surrender or avoid it. He was not the agent or trustee of the plaintiffs and his act would not be an equivalent to their act, but the contract was made by him; and his failure to pay the premium, if it was known to the plaintiffs and was acquiesced in by them and ratified by them, would be an abrogation of the contract. His act, not specially authorized or ratified, would not have that effect. If you find from the evidence that there was any affirmative act on the part of these plaintiffs or any act of their father that was approved and ratified by them, which abrogated this contract in any way, your verdict will be for the defendant."

Record, pp. 167–168.

As we have shown, there was absolutely no evidence to the effect that the beneficiaries knew of the non-payment of the premium. It does affirmatively appear that they did not know even of the existence of the policy, and of course were not aware of the non-payment of the premium. There was nothing to submit to the jury. The court should have peremptorily instructed the jury in favor of the respondents. There was nothing in the case upon which the court could submit the question to the jury of whether or not the beneficiary had knowledge of the non-payment of the premium. The only error the court committed was in submitting the matter to the jury at all. That was in favor of the petitioner and against the respondents; hence not prejudicial error.

The petitioner at the trial and in its requests for instructions admitted that the respondents had a vested interest in the policy and a contractual right to pay the premium. This being true, they had a right to pay the premium until the policy was forfeited. If the notice law of New York applies, there is no real pretense that it was *forfeited.* The chief defense is not forfeiture, but a claimed estoppel on the respondents from enforcing the contract. The language referred to is:

"Plaintiffs had the right, however, by virtue of their interest in the policy to have paid any premium at the time it fell due (we will show by decisions of New York no premium was due until notice was served), and the defendant would have been bound to accept it."

This court clearly held in the Cohen case that the neglect or refusal of the insured would not bind the beneficiary where she was not aware of the non-payment of the premium; hence the failure of Mr. Hill to pay is no defense in this case. This court in the Cohen case held that a provision in a contract of insurance like that in Baxter *vs.* Ins. Co., 119 N. Y., 450, that it was "a contract made and to be executed in New York and construed only according to its laws," would make the contract subject to the notice law of New York. This contract contains the agreement that:

"It is agreed that the contract when made shall be held and construed at all times and places to have been made in New York."

I.

Parties to a contract may by agreement subject their contract to the operation of the laws of the State or country of their choice, and the courts will give full force and effect to such an agreement. The parties to this contract by such an agreement made New York the place of contract.

The question where this contract was made was not an open one in the court below, neither is it here. The parties conclusively settled that question for all time by a clause in the contract. The very first thing they did, before either party was bound by the proposed contract, before the medical examiner had made an examination of the risk, or the officers of the company accepted the risk, at the suggestion of the company and as required by the company, they agreed, if the contract ever was made, if the contract ever was completed, and without regard to where it was completed, but "when made should be held and construed at all times and places to have been made in New York." Just preceding the paragraph from which the above is quoted is the following requirement of the company in the printed application it presented to Mr. Hill to sign: "The following agreement and declaration must be signed by the person in whose favor the policy is applied for and by the person whose life is proposed for insurance."

It is settled law that parties may fix the applicatory law by such an agreement. This rule was evidently understood by the insurance company when it prepared this contract. The language it employed is most emphatic. It wanted it so plain that "he who ran might read." It wanted it so plain that there could be no doubt about its interpretation and meaning. It took good care to forever foreclose any

controversy as to where the contract was made. It did not leave it to a recital in the policy "that it was made, executed, and delivered in New York." It evidently thought that might leave it open to evidence as to the place where it was actually made, but says that "*the contract when made shall* be held and construed at all times and places to have been made in New York." If this court gives effect to this agreement *it must hold*, in the language of it, that the contract was made in New York; it must construe this contract, as this clause requires that it should be construed, by the laws of New York. In the Cohen case Mr. Justice Brewer says:

"It is not doubted that a contract by an insurance company of New York executed elsewhere may by its terms incorporate the law of New York, and make its provisions controlling upon both the insured and the insurer. * * * While the contract is based upon the application, yet the latter is only a preliminary instrument, a proposal on the part of the insured, and a stipulation that it shall be controlled by the charter and the laws of the State is not tantamount to a stipulation that the policy issued thereon shall also in like manner be controlled. * * * But that (the clause in the Cohen application) is very different from a provision that the contract issued upon such application should also be in all respects controlled by the laws of New York. * * * The stipulation in this policy is different from that presented in the court of appeals of New York in Baxter *vs.* Brooklyn L. Ins. Co., 119 N. Y., 450, which was that it was a contract made and to be executed in the State of New York, and construed only according to the laws of that State. There was a direct provision in respect to the contract itself, and thus incorporated those laws into its terms. * * * Baxter *vs.* Ins. Co. contained in the contract as heretofore stated an express stipulation of the controlling law."

In this case it is "the contract when made (not the application) that shall be held and construed at all times and places to have been made in New York. This fully meets

the suggestion of the court and clearly distinguishes this from the clause in the Cohen policy, as in this case it is not the application but the contract when made shall be held to have been made in New York. In the language of the court it is the contract issued upon such application (not the application) that the parties agreed shall be deemed to have been made in New York."

The very first words of the application contained the identical language referred to in the extracts above quoted from the Cohen case, that the application was made "subject to the charter of the company and the laws of New York." So in this case the application is subject to the charter of the company and the laws of New York; but it is agreed that the contract when made should be held to have been made in New York and to be construed by the laws of New York. In addition to this, the company required performance wholly in New York.

The provision in this case, we think, is as strong and even stronger than the provision in the Baxter case, which, this court held, made the Baxter policy a New York contract, which was that "it was a contract made and to be executed in New York, and construed only according to the laws of New York." The last clause adds very little, if any, to the agreement. It would be just as strong if it simply used the language a "contract made and to be executed in New York," because, that being true, it would follow that the contract was governed by that law. In this case it is not only agreed that the contract was made in New York, but the policy provided that it was to be performed only in New York.

The words "contract when made," as used in the application, means a contract when signed, sealed, and delivered and everything done necessary to be done in order to make it a complete and binding contract on all parties.

Mr. Anderson in his law dictionary defines the word "make," of which "made" is past tense, as follows:

'To sign, seal and deliver; to execute: as, to make a deed, bill, note. The maker of a note is one who has executed and delivered the note."

When we speak of one who has made an assignment or contract, we mean one that has been executed and delivered. Mr. Abbott in his law dictionary defines "make" as follows:

"To make a contract is to agree, or if a written contract is contemplated to execute the paper with the requisite formalities and usually to deliver it as binding."

"'Make' spoken of in writing *inter partes* usually implies delivery; ordinarily the expression, made a note, imports that it was not only signed but delivered as an obligation. The instrument has no inception when the subscriber retains it for future disposal. 'An averment in a declaration or complaint of the making of a promissory note includes delivery to the payee. (Chapell *vs.* Bissell, 10 How., p. 274; 2 Cowen, 536). An averment that defendant made the note in suit is equivalent to saying that he signed it and delivered it to the payee (Sawyer *vs.* Warner, 15 Barb, 282). In the case of Wood *vs.* Owins, the U. S. Supreme Court has given a construction to the word "make" in reference to contracts. It holds that when a contract is signed, sealed and delivered, it is then made and not before. (Owins *vs.* Wood, 2 Cranst., 283, p. 258). To the same effect is Woodruff *vs.* Dorwin, 3 Vt., 82; 5 V. L., 500: also Gould on Pleading, 821: Chitty on Pleading, 257.'"

This makes it clear that the parties meant, when they used the words "It is agreed that the contract of insurance when made shall be held and construed at all times and places to have been made in the State of New York," a completed, a binding contract to have been made in New York.

Several courts have passed upon policies where they were actually issued and made in one State, but in which the policies or applications used the identical language of this contract or language identical in substance in order to make

the place of contract in some other or different State. These courts hold such language effectually establishes the place of contract. It will further be observed that in most of the case- the parties attempted to waive a statute in the State which was agreed upon as the place of contract. The court holds in each instance that a provision attempting to waive a public policy statute of a State of the agreed place of contract is void and of no effect. On the place of contract and the effect and validity of a clause waiving a statute of the agreed place of contract, we quote from them as follows:

"The policy of insurance provided that it was accepted upon the further conditions and agreements contained on the following page which are made a part of this contract *and which contract shall be held and construed to have been made in the city of Cincinnati, Ohio.* The contract of insurance having been made with reference to the laws of the State of Ohio, the plaintiff had a right to rely upon them in enforcing his contract so far as they related to its validity, nature, interpretation and effect (Bank *vs.* Rickman, 16 Grat., 126, 127; Corbin *vs.* Bank, 87 Va., 665, 13 S. E., 98; 3 Minor Inst., 145; Story, Conf. Laws, secs. 263, 280.)"

Union Central Life Insurance Company *vs.* Pollard, 26 S. E., 421.

"As we have said, it is argued that the policy in suit is a New York or Nebraska contract, and that there is no such law as that above set forth in either of these States. The policy was signed by the president and the secretary of the company, in the city of New York. The premium was made payable there and the amount of the policy was to be paid, in the event of the death of the assured, at the city of New York. *It was expressly agreed that the policy should be construed to have been made in the State of New York.* It was therefore a New York contract, and it is to be governed by the laws of that State (Richards. Ins., 44)."

Goodwin *vs.* Ins. Co. (Iowa), 66 N. W., 157, p. 160.

"There can be no doubt that this policy is to be construed according to the law of Pennsylvania. It is expressly provided in the application, which is made part of the policy,

that '*the place of contract shall be the city of Philadelphia, State of Pennsylvania.*' In Weyman *vs.* Southard, 10 Wheat., 1–48, Chief Justice Marshall stated it to be a principle of universal law that 'in every forum a contract is governed by the law with a view to which it is made.' (See Pritchard *vs.* Norton, 106 U. S., 124, 136; 1 Sup. Ct., 102, and cases there cited.) In this case no necessity exists for presumption from the circumstances, because the intention of the parties is expressed."

Penn. Mutual Ins. Co. *vs.* Savings Bank, 72 Fed., 413 on p. 418.

"It was also stipulated that the *said contract should be construed and governed by the laws of the State of New York.*"

The court held that under that provision the contract was dominated by the notice law of New York.

Johnson *vs.* Ins. Co., 78 N. W., 905.

"Looking to the policy in question we find inserted therein a condition, as follows:

* * * "'*This policy is a contract made and to be executed in the State of New York*, and shall be construed only according to the character of the company and the laws of that State.' From which it clearly appears that it was the intent of the parties to locate the place of its execution in the State of New York. Especially does this appear to have been the intention of the defendant. The provision above quoted appears as a part of the printed form of the policy issued by the company. It could have been inserted therein only after full consideration, and its insertion could have had but one object, and that was to bring the policy as fully within the terms of the State of New York as though it had been actually executed and delivered therein. This was done for the benefit of the company, and it must abide the results flowing therefrom. In our opinion sufficient appears upon the face of the policy to require us to construe it as though it had been actually executed and delivered in the State of New York. It must follow that the statute in question must be given force in determining rights founded thereon."

Griesemere *vs.* Ins. Co., 10 Wash., 202.

The supreme court of Georgia has recently supported this view of the case. The syllabus is written by the court and is as follows:

"Where, in a policy of insurance issued by an insurance company of the State of Massachusetts, it was stipulated as follows: 'No suit shall be brought under this contract, unless commenced within one year from the termination of the life of the member to whom it is issued, it being an express condition hereof that all rights of action hereunder are limited to said period of one year.' *It is further expressly agreed that the place of contract is the home office of the association, in the city of Boston, and this contract will be governed by, and construed, only according to, the laws of the State of Massachusetts* and where a law of the State of Massachusetts (Supp. Pub. St. Mass., 1882–88, p. 517, sec. 26), which was of force at the time the policy was issued, provided with reference to insurance companies of that State, as follows: 'No such company shall make any stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit thereon may be brought, nor shall limit the time within which such suit may be commenced to less than two years after the cause of action accrues, and any such condition or stipulation shall be void,' *held, that the stipulation in the policy limiting the time within which suit may be commenced thereon to one year from the termination of the life of the member to whom it is issued is void*, and suit may be brought thereon at any time within the period allowed by the statute of limitation."

Mass. Ben. Life Ass'n *vs.* Hale, 23 S. E., 849.

In the case of Rosenplanter *vs.* Ins. Co., Judge Lurton, speaking for the court, said: "The contract in question is a New York contract, as it specifically provides that 'at all times and places it shall be construed to be a New York contract,'" notwithstanding the parties lived in Tennessee, where the contract was made.

Rosenplanter *vs.* Ins. Co., 96 Fed., 721.

"And it was stipulated in said policies that, if said annual premiums were not paid by or before said day, said policies should lapse and become void, and all payments made thereon should be forfeited to the company. *It was also*

stipulated that the said contracts or policies should be construed and governed by the laws of the State of New York. * * *

"There are but two questions involved in this appeal. The first is raised by appellant, and is whether, under the provisions of the New York statute above quoted, it was necessary to give the insured notice when the notes fell due, in order to entitle it to declare the contracts forfeited.

"In determining the question raised by appellant we are compelled to construe the New York statute quoted, and declare the meaning of the contract, reading the statute as a part of it. To do this involves only the well-known rule which requires the courts to declare the legal effect of a written instrument put in evidence, because such statute becomes a part of the written contract, and must be construed as such, with these differences, however: (1) *The requirements of such a statute cannot be waived by the parties;* and (2) the statute ought, perhaps, to receive the same construction by the courts of another State as is given to it by the courts of last resort, in the State where it was enacted. This rule is based, it is said, upon that section of our Federal Constitution which declares that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.'" * * * "We come, then, to consider the terms of the statute just as if they were literally printed in the policies, as we are required to consider and construe any other written contract, except, *as it was proved to be the statute law of New York, its provisions are mandatory and cannot be waived by the contracting parties.*"

New York Life Ins. Co. *vs.* Orlopp, 61 S. W., 337.

In the case of Washington Central Bank *vs.* Hume, 128 U. S., 195, this court passed upon a similar provision in a policy of insurance issued by a Connecticut company to a resident of the District of Columbia. It appears by statement of the case by Mr. Justice Fuller that the contract contained the following provision, that "the policy was issued and delivered at Hartford, in the State of Connecticut, and was to be in all respects construed and determined within the laws of that State." Speaking of this provision and the fact that the performance of the contract was to be in Connecticut, this court said:

"The rights and benefits given by the laws of Connecticut in this regard are as much a part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place.

"And if this be so as between Hume and the Connecticut companies, then he could not have, at any time, disposed of these policies without the consent of the beneficiary nor is there anything to the contrary in the statutes or general public policy of the District of Columbia."

To the same effect is a decision of the supreme court of Michigan:

"That no mistake might occur as to where the contract was to be regarded as having been executed and consummated the defendant company provided in its blank form for membership which was furnished to Mary Kelly and signed by her the following: '*It is further agreed that this contract shall be considered as having been entered into at Elkhart, Indiana, and shall be governed by and construed in accordance with the laws of said State.*' Yet in the face of this provision of the by-laws and this stipulation in the application for insurance, counsel for defendants contend that the contract is to be construed as a Michigan contract and not one made and consummated in Indiana. The court held the policy an Indiana contract."

Voorhees *vs.* Ins. Co., 91 Mich., 469; 51 N. W., 1109.

In the case of Griffith *vs.* New York Life Ins. Co., 101 Calif., D. 627, it will be noted that there was a provision in the application which was a part of the policy "that the place of contract was the State of New York," and "the policies were issued and all payments are to be made at New York in the State of New York, where defendant is organized."

The court held that these provisions subjected the policy to the laws of that State and required the service of the statutory notice before the policy could be forfeited.

To the same effect is Johnson *vs.* Ins. Co., 109 Iowa, 708. The court says:

"The defendant company was duly incorporated under the laws of the State of New York, and the policy was issued in that State, and by the terms of the application the contract was to be construed by the lawsthereof. It was therefore a New York contract."

If the parties did not intend this contract to be construed by the laws of New York, if they did not intend the court to declare that the contract was made in New York, what meaning did they intend the words that "the contract when made shall be held and construed at all times and places to have been made in New York" should have? Did they carefully prepare the language of this clause to make it clear the place of contract should be in the State of *Washington?* Was it a mistake when they used the words *New York* and intended *Washington?*

If they had used the word Washington instead of New York, would not the court be bound to hold with them that in truth and fact it was a Washington contract?

The attorney who prepared this contract used most apt language to designate New York as the proper law. They prepared it in the light of the repeated decisions of the most renowned courts that such language would be effectual in establishing the applicatory law. Having prepared the contract with care and skill, with the distinct and clearly expressed object in view of making the contract a New York one, it is no wonder that the company finds it difficult to show that just the opposite was intended.

At the one time the care and skill of the attorneys was employed to make it clear that the contract was to be governed by the laws of New York. Now they employ the attorneys to make as brave an effort as possible to show the language employed should have no such construction.

II.

New York is the place of performance of the contract. The presumption is that parties intended that the place of the performance of the contract shall be the place of contract.

The provision noted in the contract expressly stating that "the contract, when made, shall be held and construed at all times and places to have been made in New York," is not the only provision of the contract showing in the clearest manner possible that the parties intended to make the law of New York the applicatory law. In the absence of such a stipulation, courts invariably hold that the parties intend to make the place of contract that of the State or country in which they agree it shall be performed. It is presumed, as said in Hyde *vs.* Goodnow, 3 N. Y., 266, 269, that the parties look to the "law of the place of performance, in ascertaining the validity, obligation and effect of the contract." In this case the presumption arising that the parties intended New York to be the place of contract, by reason of making that the place of performance, is in entire accord with the express agreement of the parties to the contract. By an examination of the contract it will be observed that the policy was issued in New York upon the receipt of the application, and, as it recites in the policy, "in consideration of the application for this policy, which is hereby made a part of this contract." By the terms of the policy the proofs of death were to be delivered to the company at its home office, in the city of New York. The policy, when it matured, was payable to the beneficiaries in the State of New York. The policy provided that "the annual premium of $814.00 shall be paid in advance on the delivery of this policy and thereafter to the company at its home office in the city of New York on the 29th day of April in every

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New York is the place of performance of the contract. The presumption is that parties intended that the place of the performance of the contract shall be the place of contract.

The provision noted in the contract expressly stating that "the contract, when made, shall be held and construed at all times and places to have been made in New York," is not the only provision of the contract showing in the clearest manner possible that the parties intended to make the law of New York the applicatory law. In the absence of such a stipulation, courts invariably hold that the parties intend to make the place of contract that of the State or country in which they agree it shall be performed. It is presumed, as said in Hyde *vs.* Goodnow, 3 N. Y., 266, 269, that the parties look to the "law of the place of performance, in ascertaining the validity, obligation and effect of the contract." In this case the presumption arising that the parties intended New York to be the place of contract, by reason of making that the place of performance, is in entire accord with the express agreement of the parties to the contract. By an examination of the contract it will be observed that the policy was issued in New York upon the receipt of the application, and, as it recites in the policy, "in consideration of the application for this policy, which is hereby made a part of this contract." By the terms of the policy the proofs of death were to be delivered to the company at its home office, in the city of New York. The policy, when it matured, was payable to the beneficiaries in the State of New York. The policy provided that "the annual premium of $814.00 shall be paid in advance on the delivery of this policy and thereafter to the company at its home office in the city of New York on the 29th day of April in every

year during the continuance of this contract." It is clear from this provision that the only place the company had any right to demand the payment of the premium was at its home office, in the city of New York. The beneficiaries could require the acceptance of the premium by the company only at its home office in the city of New York. The obligation of the one was to pay in New York, of the other to accept payment in New York. The company could not demand payment of the premiums elsewhere; the beneficiaries could not require the acceptance of the premiums elsewhere. The payment of premiums and the collection of premiums was business to be done in New York. No forfeiture could occur except for non-payment of a premium at the place where it was payable and where it was solemnly agreed by the parties that the contract was made. This being true, the company had no right to insist upon the payment of the premium or upon a default for the non-payment unless it showed that it had first complied with the notice law of New York, where alone it could exact payment. The validity of any declared forfeiture, then, is made to depend both upon the law of the place where the contract was made and where it was to be performed, these places being identical, to wit, in the city of New York. If the policy were not forfeited under the laws of New York prior to Mr. Hill's death, it was not forfeited at all and was a valid contract at that time. The rule we are contending for is clearly supported by the authorities.

Mr. Justice Harlan, in a case reported in the 142 U. S., 101, on page 109, uses this language:

"We have seen that the bonds in suit were redeemable on the first day of January, 1866, and not before without the consent of the holder, and were payable in pounds sterling with interest at the rate of five per cent. per annum from date, the interest to be paid semi-annually on named days, 'on presenting the proper coupons for the same at the house of Palmer, Mackillop, Dent & Company, London, where the principal will also be redeemed on the surrender of this cer-

tificate.' *The contract, therefore, was one which in all its parts was to be performed in England.* Nevertheless, it is contended that the principal sum agreed to be paid should bear interest at the rate of seven per cent.; fixed by the laws of South Carolina. The only basis for this contention is the mere fact that the bonds purport to have been made in that State. But that fact is not conclusive. All the terms of the contract must be examined, in connection with the attendant circumstances, to ascertain what law was in the view of the parties when the contract was executed. For, as said by Chief Justice Marshall in Wayman *vs.* Southard, 10 Wheat., 1 on p. 18, 'it is a principle, universally recognized, that in every forum a contract is governed by the law with a view to which it was made.' And by Lord Mansfield in Robinson *vs.* Bland, 2 Burrow, 1077, 1078, 'the parties had a view to the laws of England. The law of the place can never be the rule when the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed. Now here the payment is to be in England; it is an English security, and so intended by the parties.'

"Referring to these and many other cases, this court speaking by Mr. Justice Matthews, held, upon full consideration, in Pritchard *vs.* Norton, 106 U. S., 124, 136, that the law upon which the nature, interpretation and validity of a contract depended, was that which the parties, either expressly or presumptively incorporated into it as constituting its obligations."

Again this court in the case of London Assurance Co. *vs.* Companhia de Moagens de Barreiro, 167 U. S., 149, said:

"Under the circumstances we think that this contract of insurance is to be interpreted according to English law. The appellant is an English company. It made the contract in Philadelphia, by its agents, and that contract by its terms was to be performed in English. * * * This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own."

"The contract between these parties, however, was in regard to a suit pending in the State of New York; the property attached was there situated; the services to be performed were to be performed there; and the money to be recovered, if recovered at all, was there to be recovered. The contract in short was to be performed in the State of New York. The law of New York therefore, must necessarily govern the contract."

Richardson *vs.* Roland, 40 Conn., 565–572.

In a case cited in the supreme court of Massachusetts Justice Carey uses this language:

"The notes in suit having been made and payable in Louisiana, the question of the validity depends upon the law of that State. If they are void by that law, they are void everywhere."

Stevenson *vs.* Payne, 109 Mass., 378.

The supreme court of New York states the rule that we are contending for in this language:

"It is a general rule of international law that the rights of the parties to a contract, as distinguished from their remedies are to be determined by the law of the place where the contract is to be performed. If a contract be made in one State or country, and it appears upon its face that it is to be performed in another, it will be presumed that the contract was entered into with reference to the laws of the latter, and those laws will be resorted to in ascertaining the validity, obligation and effect of the contract. *This general rule, however, has its exceptions; one of which is that where a contract is declared void by a law of the State or country where it is made it cannot be enforced as a valid contract in any other, though by its terms it was to have been enforced there.*

"Thus, assuming that the contracts in question had been made in Ohio, and that by the laws of that State such contracts are declared void, the courts of this State would be bound also to declare them void, though, by their terms, they were to have been performed here, and though if made here they would have been valid contracts. This exception is required by that just comity and public convenience upon which all international law is founded. *A contract which is*

illegal and void, either by the law of the place where it is made, or that of the place where it is to be performed, is illegal and void everywhere."

Hyde *vs.* Goodnow, 3 N. Y., 266–269.

In another decision it uses this language:

"Under these circumstances, although the suit is brought in this State, the interpretation and validity of the contract cannot depend upon the laws of New York. The *lex fori* governs as to the remedy or remedies for enforcing the contract, but not as to its construction or the legal rights arising under it. These depend usually upon the laws of the place where the contract is to be performed, although where there is anything in the circumstances to show that the parties had specially in view the law of the place where the contract is made this law will govern although the contract is to be performed elsewhere. I see nothing in the present case to indicate that the parties contracted with special reference to the law of Georgia. As no other place was mentioned payment was of course to be made in New Jersey where the principal office of the company was located; the contract was to be performed there, and hence, upon the general principle adverted to the validity of the contract and the rights and obligations of the parties under it must depend upon the law of New Jersey."

Reese *vs.* Ins. Co., 23 New York, 516, p. 521.

The supreme court of Iowa states the rule thus:

"The general rule is well settled that the law of the place where the contract is made is to govern in enforcing and expounding it, unless the parties provide for its execution elsewhere, in which case it is to be governed by the law of the latter place."

Arnold *vs.* Potter, 22 Iowa, 194.

III.

The petitioner is estopped from claiming that the contract was not actually made in the State of New York. It was not competent for it to attempt to prove that the contract was made at any other place than the agreed one.

It is a well-settled proposition of law that parties to a contract may agree upon an assumed fact, base their contract upon it, and if they do so they preclude each from ever relying upon the actual fact, or from offering evidence to overthrow or dispute the agreed fact. It is but the statement in another way of the rule that parties are not at liberty to vary the terms of written agreements by parol testimony, except by allegations of fraud or mistake. Parties are not at liberty, except on allegations of fraud or mistake, to offer evidence to change the terms of a written agreement, or show facts different from those they have agreed upon as true and as the basis of their contract. We claim that that is exactly what the parties did in this case, when they insisted in the application that—

"It is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by said company, and the first premium thereon paid while the person passed for insurance is in the same condition of health described in this application * * * and the contract of insurance shall be held and construed at all times and places to have been made in the city of New York."

The purpose of this provision is apparent; it can have but one meaning. The parties could have had but one intention in inserting it, and that was to settle forever the question of the place where the contract was actually made.

It says the contract when made, as distinguished from the application in which it was inserted, shall be held to have

been made in New York. The words "contract when made" mean when completed—when it becomes binding on all the parties. The language "shall be held and construed at all times and places" means that the contract as a whole or any stipulation in it when under consideration in court or out of court shall be so construed; that a court shall interpret it and enforce its obligations exactly as it would if made in New York. In fact, the clause is so worded that that place where the contract was made is conclusively proved as soon as the contract is placed in evidence. It was evidently intended to so word the clause that it should never after be open to the parties to show by evidence that the contract was made in any other State than New York. They certainly could have used no language more appropriate to express that intent.

This clause was inserted in the application by the insurance company. It is the language of the company. It was not a clause prepared for this particular contract, but one intended to go into all the contracts. There are many reasons why the company would be desirous of inserting this clause in its contract. Without some such agreement the question of place of contract would frequently be left in doubt or subject to a jury's verdict on possibly conflicting testimony.

In case some or all of the active participants to the transaction were dead, it would be left more or less to conjecture and be difficult for judge or jury to determine what time and what place the last act was done that completed and consummated the contract.

It must be apparent at once that if parties to a contract (especially an insurance company issuing hundreds of policies in different States) had any particular choice as to the place of contract, it would be both unwise and unsafe to leave so important a question open to the recollection of those familiar with the transaction or to letters or written memoranda which might or might not be held evidence

of the transaction, or, if evidence, which might be lost. Certainly is this true of a contract of life insurance, where it is presumed that it will not be terminated or such questions will not arise until the death of the insured, many years after the contract is made. In such a case it is presumed at least that the insured will be dead and that the agent may have passed away or to distant countries and all track of him lost. Even if all parties were expected to be alive, it certainly must be presumed that their recollection of what took place after the expected lapse of time would be indistinct and faulty, even if both would undertake to tell the unvarnished truth.

Prudence would at once suggest the necessity of forever setting at rest, if possible, so important a question as the place of contract. It certainly would be wise to so fix and establish so important a fact that it would never need evidence to establish it; to establish such fact in advance, so that it would not be open to either party to attack or dispute it.

So the insurance company in this case, in the light of its experience, required the insured to agree in advance, as it was competent for them both to do, that the contract when made should be held and construed at all times and places to have been made in New York. They did this, and inserted it in the written contract so that, whenever either party undertook to enforce the contract, the contract itself would contain conclusive evidence of the place where the contract was actually made. They did not leave it open to faulty memories or testimony of unscrupulous witnesses. They closed the door effectually.

If there is any part of this contract that is not open to be varied or contradicted by parol testimony it is the clause providing that New York is the place where the contract was actually made. The only way that the parties could attack this agreement or show any fact contradictory to it would be by allegation and proof that it was inserted by

fraud or mistake. They make no such claim. They simply ask permission of the court to dispute the agreed fact, because they will gain an advantage by the homicide of their own offspring.

There is another reason why the insurance company would be anxious to insert such an agreement in their contract. They claim and it may be admitted that they were issuing policies at that time in many States and to thousands of policy-holders. In many instances the applicant would pay the premium in advance and get a binding receipt making his contract good from the day it was accepted at the home office. In such a case the contract would be made in New York. In many other cases the applicant would not pay his premiums until the delivery of his policy, and thus make the place of contract at the place of delivery of the policy and the payment of the premium.

Experience had taught it that it was good business policy, in a field where competition was active, to accommodate its prospective policy-holders as to payment of the first premium by giving them the choice of payment either at the date and place of the application or on delivery of policy. It knew it could do so safely and still make the place of contract in New York by inserting an agreement like this one in the policy.

Another reason might and probably did influence the company and suggest the advisability of this course. Different courts, on practically the same facts, differed as to the rule establishing the place of contracts. Some courts held that the mailing of a policy from the home office to its local agent in another State was a delivery at the home office. Other courts held that until the policy left the hands of the local agent it was within the control of the company, and the delivery did not take place until the agent handed it to the insured, and that in such cases the delivery took place in the State where this was done by the agent. This rule was still further confused by

the place, time, and manner of the payment of the premium. In some instances the premium would be paid at the date of the application, other times at the date of the delivery of the policy; other times the agent would be indebted to the applicant and undertake to look after the payment; then the question would arise, was payment as of the date of the application, etc.? Still other times a credit would be given the applicant by the agent. Some courts held that a credit so given by a general agent would be good from the date it was made; others held it would not be good until the premium was actually paid. Some courts would extend the rule of the law of the place where actually made, and limit the rule of place of performance, and *vice versa*. Some courts, especially English courts, consider important the place of domicile of the parties; others extend very much the rule of the law of the forum.

There is about as much confusion and about as many rules as there are different appellate courts. A reading of the different decisions on this point of the same appellate court, in most courts, is far from satisfactory. A brief examination of the reported cases in the different appellate courts will show the statement correct.

An insurance company issuing policies in many States would desire as far as possible to have all the contracts measured by the same law. It is fairer to the company and fairer to the policy-holder, *especially in a strictly mutual company*. Under the conflicting authorities mentioned, it would not be safe to rely on simply providing that they should all be performed in one place, though parties ought to be able to rely on that as sufficient. There would be only one safe and sure way to do: settle the question of place of contract or the proper law of the contract.

There is one rule recognized and enforced by all appellate courts. There is one rule upon which there is no diversity of opinion. That is, that parties may provide by agreement that their contracts shall be deemed to have been made in a

certain State or country, and full force and effect will be given such agreement unless in so doing they are trying to evade a public-policy statute of the place where the contract is made.

The company was well aware of this rule. So, to remove all uncertainty, to close the door effectually against any and all doubt, to forever remove any question as to the place where this contract was made, it inserted this agreement into the contract, that—

"It is agreed that the contract when made should be held and construed at all times and places to have been made in New York."

Such an agreement should have full force and effect, because, based on this agreement and in consideration of it, the company bound itself to pay the beneficiaries $20,000 on Mr. Hill's death. On the part of the beneficiaries, they agreed to pay $814 on the delivery of the contract and $814 each and every year thereafter upon the service of the statutory notice on the insured, or suffer the forfeiture of the money paid and their rights under the contract. The contract was finally made on the faith of this agreement as a controlling one at a time when neither party need go on with the consummation of the contract unless this provision was to have binding effect and force. That such was the intention of the parties, at least of the insurance company, cannot be doubted. Either party, at the time this agreement was made, could have required the delivery of the contract and the payment of the first premium in New York, and thus made it a New York contract. Mrs. Hill could have paid the first premium through an agent in New York, and upon the delivery to her agent there of this policy of insurance the company could have required Mrs. Hill to have paid the first premium on the policy in New York and delivered the policy to her at the place. But, instead of this, they did what was perfectly

competent for them to do—agreed that when the premium was paid and the policy delivered it should be held and construed at all times and places to have been done in New York. Having made this agreement, it is fair to assume that both parties relied upon it in fixing the laws of New York as applicatory law and regarded it unimportant where the delivery took effect. Bigelow on Estoppel states the rule as follows:

"The first class of cases under the head of Estoppel by Contract, as stated in the preceding chapter, arises where there is an actual or a virtual undertaking to treat a fact as specifically settled. Stated in full, the general rule of law appears to be this: A fact agreed or assumed to be true, as the basis of a contract must be taken to be true specifically, until the contract itself is lawfully impeached by plaintiff or defendant, or until some legal proceeding is taken to impeach the truth of the (supposed) fact; assuming that the contract itself is not contrary to law. In other words, supposing the contract to be lawful and binding, the party or parties, (it may be one, it may be all) pledging or justly assuming the fact in question will be estopped from taking any position, to the detriment of other parties, inconsistent with the special fact, except for the purpose of reforming the language of a written contract and making it conform to the rule of this agreement. The rule may be illustrated by two or three examples. Thus dealing with a person that occupies a particular position or character, it may be as administrator, executor, trustee, director, agent, or holder of any manner of office, will estop that person, generally speaking, to deny the fact agreed or assumed in regard to his position or character. So a contract based upon one's having a certain title to property will estop the parties, or the party pledging the fact if it be the act of but one, in the performance of the contract, from claiming a different title. And so accepting and treating an article in shipment as baggage may estop owner and carrier from treating it as freight."

Bigelow on Estoppel, 5th ed, 459.

"It is a sound rule of law that a written contract cannot be altered or varied by parol proof. This excellent rule

of law is intended to guard against fraud and perjuries, and cannot be too steadily enforced and supported by courts of justice. * * * This rule prevails equally in a court of equity and a court of law. Generally speaking, the rules of evidence are the same in both courts, and if words of a contract be intelligible there is no instance where parol proof has been permitted to give them a different sense. You can introduce nothing on parol proof that adds to or deducts from the writing. If, however, through fraud or mistake, it is made to speak a different language from what was intended, the estoppel does not apply. These are the only cases that form an exception to the rule. * * * Notwithstanding these matters, the parties to a deed or a contract may agree to bind themselves in this respect by stating a particular state of things as a part or basis of the grant or contract. And when this thing is done with sufficient clearness as to leave no doubt as to the intention, it falls within the general principles that matters which have been solemnly reduced to writing cannot be denied, and constitute an estoppel by deed."

Herman on Estoppel, p. 708, sec. 575.

"That the doctrine of *estoppel in pais* is a most equitable doctrine and one without which the law of the country could not be satisfactorily administered."

"When a person makes to another the representation, 'I take upon myself to say such and such things do exist' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action."

Herman on Estoppel, sec. 1170.

Wharton on Evidence states the same rule in this language:

"If a distinct statement of a particular fact is made in the recital of an instrument under seal, and a contract is made with reference to that recital, it is clear that, as between the parties to such instrument and in an action upon it, it is not competent for the party bound to deny the recital."

Id., sec. 1039.

"We must, however, again emphasize, as bearing on both admissions of rights and admissions of facts, the radical distinction already noticed, between admissions which are contractual and dispositive, and such as are non-contractual and non-dispositive; in other words, between admissions made intentionally, for the purpose of transferring a right, and admissions made casually, for the purpose of narrating an incident, or explaining an alleged right. The contractual and dispositive admission is equivalent to an offer which, when accepted by the other party, makes a contract. Such an admission, as we will presently see, when made as the basis of contract cannot be revoked."

Id., sec. 1083.

"In this view, a party making such a statement, thereby inducing another to enter into a contract with him, is bound to such other by such statement, whether it be true or false. A person, for instance, falsely claiming to be an agent, cannot dispute his statement when sued on it by a party acting on his pretension. A party warranting cannot escape liability by claiming that his warranty was false. Even an honest misstatement, by which the other contracting party is led to enter into a contract, binds the party by whom the misstatement is made."

Id., sec. 1087.

"Hence where parties have knowingly agreed to act upon an assumed state of facts, their rights will be made to depend on such assumption and not upon the truth."

Id., sec. 1146.

IV.

Baxter Case.

The case of Baxter *vs.* Ins. Co., which was referred to with approval by this court in the Cohen case as one where the policy contained a provision expressly making the contract subject to the laws of New York, was one issued on the life of one Joel Mattison, who resided in McKean county, Pennsylvania, where he died and where the policy was pre-

sumptively made. His post-office address was outside of New York. The court of appeals held that his policy could not be forfeited except by service of the statutory notice. This is a complete answer to the three contentions of petitioner, if they need an answer:

1. *The notice in such a case must be served on non-residents of New York* in a case where the statute applies by agreement of the parties.

2. That a provision in substance like the one contained in the Hill policy was sufficient to designate New York as the proper law.

3. That an insurance company of New York making contract in another State with a resident of another State could not subject the contract to the operation of the laws of New York, and then insert in the contract a provision making the contract forfeitable without notice and enforce it; that, having made the contract subject to the law of New York, it could not defend on the ground of forfeiture until it had first shown that it had served the notice; that the agreement to forfeit without notice was itself subject to the notice law.

The provision of the policy appears from the following extract of the opinion of the court:

"The policy itself contained the stipulation that it was a contract made and to be executed in the State of New York, and construed only according to the laws of that State. Aside from the provisions of the policy, and under general rules of law, the contract was subject to the terms and conditions expressed in chapter 341 of the Laws of 1876, as amended by chapter 321 of the Laws of 1877. This statute was a part of the contract in question and governed the rights and obligations of the parties in precisely the same way, and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

Baxter *vs.* B. L. I. Co., 119 N. Y., 450, on p. 454.

We filed in the Sears case a certified copy of the pleadings and case, which may also be found in respondent's brief in that case.

V.

Choice of Law—Freedom of Contract.

Strictly speaking, there is no such thing as freedom of contract, and frequently no such right as choice of law. Parties are free to contract only where a law or public policy does not intervene to prevent or control. Frequently parties are free to choose the State or country that shall dominate or control their contract. Such was the condition of the parties to this contract. But when their choice is made, the law of the State or country operates to its full extent. They may select the State whose laws shall operate on the contract, but they cannot in any manner control the operation of those laws, at least to no greater extent than one domiciled at the agreed place of contract.

In considering such a question, courts first determine what is the proper law of the contract, this of course in a case where the parties have a right of choice of the law. Having determined the place of contract or the proper law of the contract, they then determine the question of the validity of the contract, or any provision in it in reference to such laws. The court, having once determined the proper law of the contract, will give the contract just the effect or force that such law provides such a contract shall have; no more, no less. If the law is one regulating the performance of contracts, or payment of money on contracts, its laws will control on such matters. As Mr. Dicey, in his work on "Conflict of Laws," says:

"They (English judges) first try to decide what is the country *by the law of which a contract is substantially governed, and ask themselves whether a given contract is an English or a foreign, e. g., a French contract.* In determining this, they

take into account both the terms of the contract itself and all the circumstances of the transaction, such as the character of the parties, the place where the contract is made, and the place where it is to be performed, and so forth. *When from this general survey of facts they have made up their minds as to which country the contract belongs, then they hold not only the effect, but also the validity of the contract is governed by the law of such country.* If the contract is an English contract they determine its validity no less than its interpretation by reference to English law. If the contract is a French contract they determine both these points by reference to French law. That this is the train of thought in the main followed by our judges is apparent from the examination of such cases. But if this is so, two results follow. The first is that English courts do not draw a broad distinction between the law governing the interpretation or effect and the law governing the legality or validity of a contract. The second is, that as the law which governs the interpretation of a contract is the proper law of the contract, or in other words, the law or laws intended by the parties to apply to it, we are driven to the conclusion that, in general, and at any rate indirectly, the validity of a contract is governed by the proper law.

"This theory is consistent not only with the language of the English courts, but, what is of more consequence, with their mode of thought. *They hold that a contract is governed by the law of the country with which it has most substantial connection, or, to put it more shortly, to which it belongs.*"

The parties then may select the State to which they wish to subject their contract. Having done so, any public-policy law acts upon such contract regardless of whether the parties desire it to do so. Public policy or statutes declarative of public policy do not depend for their enforcement upon consent of the parties, but act regardless on every contract made within their reach or brought within their influence. If parties are free to select the proper law of their contract, that is the full extent of their freedom. When parties voluntarily subject their contract to the operation of the laws of a particular State, they subject the whole of it to those laws,

especially if they make that the place for the enforcement of their contract.

They may be free to choose the place of contract, but that does not mean that they are free to play "hide and go seek" with the laws or the public policy of that place. If they do not like the laws of a particular State or country or its public policy, they must go elsewhere for the proper law of their contract. If one does not like the taste or effect of the wines of France he ought not drink them. If he does he will get both. If I do not like the laws of Persia relative to persons or property, I should not subject my person to its jurisdiction or make my contracts in reference to its laws.

A chemist might as well put bicarbonate of soda in a crucible containing nitric acid and argue that the acid would not affect it because he did not desire or intend that it should. He had the choice of doing with his soda as he saw fit. He need not subject it to the operation of the acid. Having done so, he must expect the result that by the law of chemistry he knew would occur. So with one making a contract. If he has the choice of subjecting his contract to the operation of the laws and public policy of a State different from that of the place where it is made, and he does so, he must expect it to take the form and be read and enforced in the light of the laws and public policy of that State. He has no control over the law and public policy of such State. When he once has committed his contract to the operation of the laws of such State, they act upon it exactly as if made there. A court enforcing the laws of a State does not shut its eyes to any provision in the contract contained and to be performed in it, but reads it in conformity to the law of the State; enforces that which its laws favor, ignores that which its laws abhor.

Parties living in one State may physically repair to another State solely for the purpose of making their contract in that State and subjecting it to the operation of the laws

thereof, or they may remain at their domicile and provide in the contract that it shall be deemed to have been made in the other State and be wholly performed therein. The effect in either event is the same. They have irrevocably submitted their contract to the operation of the laws and public policy of that State. Like the chemist with his bicarbonate of soda, they have voluntarily placed it in the crucible of the public policy of that State, which will act upon it regardless of their desire.

Petitioners admit that the Hill contract was in all respects to be governed by the laws of New York except in the one matter, the notice law. That being so, it was, in the language above quoted from Mr. Dicey, "substantially governed" by or had "most substantial connection" with the laws of New York; hence a New York contract in its entirety. On page 40 of their brief they say:

"The parties themselves have not by any agreement or convention in the policy expressly agreed that the statute (premium notice of New York) should govern. It is, indeed, true that this court in the Cohen case said:

"It is not doubted that a contract by an insurance company of New York, executed elsewhere, might by its terms incorporate the laws of New York and make its provisions controlling upon both the insured and the insurer."

"We are not, of course, questioning this proposition, but are simply showing that the application and the policy did not by their terms incorporate this premium notice law of New York and did not by their terms make its provisions controlling upon both the insured and the insurer.

"The language expresses the intent of the parties that the contract when made should be held and construed to have been made in New York city, but it expresses no intent as to what particular statutes, if any, of New York State shall control the actions of the parties therein."

Petitioner seems to contend that parties in subjecting their contracts to the laws of another State may treat its laws or its public policy like one might goods on a bargain

counter—buy what he desires and reject the balance. Such is not the law.

It might be well to again call the attention of the court to the fact that petitioner in effect admits that New York was the place of performance of the contract. It argues at great length that we ought not to recover or enforce performance because we did not perform on our part. In what did we not perform? It says we did not pay all the premiums required by the policy. Three payments of premiums was the part we were to perform. They thus admit the premises of our argument that New York was the place of performance on our part, upon condition of the service of the statutory notice, because the policy provides, in the body of it: "*The annual premium of* $814 *shall be paid in advance on the delivery of this policy and thereafter to the company at its home office in the city of New York*" (Record, page 6). It is true that the policy provides, in a subsequent provision, that—

"*Each premium* is due and payable at the home office of the company in New York; but will be accepted elsewhere when duly made in exchange for the receipt signed by the president or secretary."

But this would be true without such proviso. It does not change the fact that New York was the only place it could require of us by notice to pay the premium, or the only place we could compel it to accept the premium. It really admits in its brief that the contract may be considered to have been made in New York. It says:

"The clause in the application on which the plaintiffs rely merely is to the effect that the contract shall be considered as having been *made* in New York. This particular clause contains nothing concerning performance of the contract (*i. e.* payment by the company of the amount insured), nor does it say anything concerning performance of conditions by the insured necessary to the continued existence of the contract, such as payment of the premiums.

"The natural meaning of the clause in the application is that the making of the contract, *i. e.*, the entering into of the

contract, or the creation of the obligation and all the elements involved in these ideas, are to be governed and determined by the law of New York, *e. g.* mutual assent, form.

"As the clause refers merely to the making of the contract, that is, its initiation, it has nothing to do with the performance of the contract by the company nor with the performance of conditions by the insured. The clause has reference solely to the *lex loci celebrationis contractus.* It has nothing to do with the *lex loci solutionis.*"

So we have the admission of petitioner that the contract may be considered to have been made in New York. And the contract certainly provides for the payment of the premiums in New York—for performance in New York. It also provides for payment of the policy by the company to the beneficiaries in New York. Further as above stated it claims we did not perform—did not pay premiums in New York.

When the contract is made in one State and to be performed there the authorities are all harmonious on the rule as to the law controlling its validity. Where a contract is made in one State to be performed in another State and there is no express provision of the contract adopting the latter State as the place of contract, yet as we have already shown, practically all the authorities are agreed that its validity as a whole is dependent upon the laws of such State.

Mr. Dicey, in his work on Conflict of Laws, page 555, says:

"The proper law of a contract is, in a great number of instances, the law of the country where the contract is to be performed. The assertion therefore of many writers, that the essential validity of a contract is governed by the law of the place of performance does not in its results differ greatly from our rule" (the English rule).

Id., 765:

"The essential validity of a contract is to be tested in the main by the law of the place of performance

(*lex loci solutionis*), though it may occasionally depend on the place where the contract is made (*lex loci celibrationis*); *in any case it does not depend on the intention of the parties.*"

Id., 764:

"*Parties who contract under a given law cannot at their will make a contract legal or valid which the law declares to be illegal and invalid.* It is also plain in many cases that a contract which is unlawful by the place of performance should be held unlawful elsewhere. The rule which prevails as to the whole prevails as to any part."

Mr. Foote reaches the same conclusion (page 375):

"The legality of a contract, depends generally upon the law of the place of intended performance.

"*An act which is illegal by the law of the place where it is intended to be done cannot be validly contracted for in any place.*"

Id., 364:

"Wide as the operation necessarily is which is given to the *intention* of the parties to a contract, it is plain that it can have no effect upon the question of the legality or illegality of the thing contracted for. *No law can permit itself to be evaded, nor can it, consistently with the principles of international jurisprudence, sanction the evasion of a foreign law.* Thus, if the thing contracted to be done is illegal by the law of the place of the intended performance, the contract should be held void, wherever it was actually entered into, by all courts alike."

Mr. Foote, 369–370, also holds that an agreement, the making of which is positively prohibited by the law of the country where made, should and would be held void in all other countries.

Mr. Minor, section 175, says:

"A contract may be invalid because the act to be done in performance thereof is prohibited by law. *A* makes a contract with *B* in New York, by which *A* promises to do an act in Virginia. The act is prohibited by New York

law, but not by that of Virginia. A moment's analysis will show that the Virginia law should govern and the contract should be sustained. The legislature, in prohibiting the act to be done, must, of course, be presumed to contemplate the doing of the act in New York; it can have no concern with the act done in Virginia. On the other hand, if we suppose the act agreed to be done is permitted by the law of New York, but is prohibited by the law of Virginia, the same conclusion must be reached. *No matter in what State the validity of a contract is questioned, a decent comity will require the courts of every State to refuse to enforce a contract the purpose and effect of which is the performance of an act in another State, which is prohibited by its laws.*" * * *

Mr. Story, in his Conflict of Laws, page 325, says:

"Generally speaking, the validity of the contract is to be decided by the law of the place where it is made, *unless it is to be performed in another country; for, as we shall presently see, in the latter case the law of that place is to govern, if valid there it is by the general law of nations held valid everywhere.*"

Id., page 327:

"*The same rule applies vice versa:* if void or illegal by the place of the contract (or performance) they are generally held void and illegal everywhere."

Id., 376:

"But where the contract is, either expressly or tacitly, to be performed in any other place then the general rule is, in conformity to the presumed intention of the parties that the contract, as to its validity, interpretation, is to be governed by the place of performance."

Id., 416–417:

"But several (foreign jurists) and indeed most of them do expressly and directly recognize the rule that when a contract is made in one place and is to be performed in another, not only may the law of the latter be called the *locus contractus, but it ought in all respects,* except as to formalities and solemnities and modes of execution, to be deemed the rule to govern such cases. In the next place, when these

foreign jurists speak of *payment* or performance they all agree that the contract must be governed by the law of the place of payment or performance and not by the law of the place where the contract is made."

This is all we are contending for here—that our duty to pay and the results flowing from non-payment are to be governed by the law of the place where payment alone could be exacted; that under the law regulating payments of premiums where we were to pay no premium was due until after service of the notice.

Mr. Rorer, in his work on Interstate Law (page 50), says:

"The law of the place where performance is to occur governs in respect to the validity and performance of contracts, made in one State, but to be performed in another, as, for instance, in commercial contracts, the time, manner, and circumstances of presentation and demand, for acceptance, *payment* or protest, the rate of interest if none be designated, and whatever else relates to the fulfillment of contract or obligation. To quote again from the highest national court, 'Matters connected with * * * performance are regulated by the law prevailing at the place of performance.'"

"The answer is that the validity of the contract to each of its elements is to be controlled by the law of the situs of the elements; by the *lex loci celebrationis*, if the question relates to the making of the contract; *by the lex loci solutionis, if it relates to the performance of it;* and by the *lex loci considerationis* if it is the consideration of the contract whose sufficiency is or legality is disputed" (Minor, sec. 167).

"If a place is designated for the place of payment of money due upon a policy of insurance there will be no difficulty in fixing that place as the *locus solutionis* of the insurance contract" (Minor, 166).

"The reason is that the parties sometimes attempt to cover their real intention of the place of performance by falsely naming a place which they really do not intend to be the true *locus solutionis*. This is done in order to evade the law of the place of performance when it would condemn the contract. In such cases, when the *locus solutionis* is of importance, it is the duty of the court to disregard the false

witness of the parties' contract and to ascertain the place of performance really intended" (*id.*, page 379).

Mr. Dicey reviews the conclusions of what he terms the best writers on this point as follows (page 766):

"Story holds that the nature, the obligation, and the interpretation of a contract are all governed by the same law, and this law, though at first sight one might suppose it from his language to be the law of the place where the contract is made, clearly is with him the law which the parties intended to adopt.

"Mr. Foote, no doubt following in this, it must be admitted, the language of Story, holds, as already pointed out, that the *lex loci solutionis* must be decisive. But all that is true in this theory is met by the consideration that the *lex loci solutionis* is more often than not the proper law of a contract, *and that in general a contract is invalid which cannot lawfully be performed at the place of performance.*

"Westlake's opinion comes very near to the admission that the proper law of a contract is the law governing its validity.

"'It may,' he writes, 'probably be said with truth that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, *the preference being given to the country with which the transaction has the most real connection*, and not to the law of the place of contract (meaning the place where actually made) as such.'"

The statute of New York is one strictly regulating performance of an insurance contract on the part of the insured. It states the exact terms on which an insurance company may exact payment of premiums (performance of the contract) from the insured. It does not pretend to deal with any other phase of the contract. It provides that the insured will not suffer forfeiture of his contract on account of non-performance on his part—non-payment of the premiums—except on the condition imposed by it, the service of the notice and failure to pay thereafter.

As we have shown, this court has recognized and enforced this doctrine in many cases. In the Phœnix Ins. Case, 129 U. S., 387, Justice Gray says:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country. There does not appear to us to be anything in either of the bills of lading in the present case, tending to show that the contracting parties looked to the law of England, or to any other law than that of the place where the contract was made."

Again in London Assurance case, 167 U. S., 149:

"*Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation.* Story in his work on Conflict of Laws, sec. 280, says: '*But where the contract is, either expressly or tacitly, to be performed in any other place, there* the general rule is in conformity to the presumed intention of the parties, *that the contract as to its validity, nature, obligation, and interpretation*, is to be governed by the law of the place of performance. This would seem a result of natural justice."

And again in Eudora case, 190 U. S., 169:

"It has often been stated that the law of the place of performance determines the validity of a contract."

"A contract which is illegal and void, either by the law of the place where it is made, or that of the place where it is performed, is illegal and void everywhere (Hyde *vs.* Goodnow, 3 N. Y., 266–269)."

"A contract for a loan made payable in a foreign country may stipulate for interest higher than allowed at home, and if the contract is illegal there it will be illegal everywhere."
Bank of Louisville *vs.* Young, 37 Mo., 398.

"The notes of suit having been made payable in Louisiana, the question of the validity depends upon the law of that State. If they are void by that law, they are void everywhere."
Stevenson *vs.* Payne, 109 Mass., 378.

But the most important of all cases decided by this court on this point is the case of Knott *vs.* Botany Worsted Mills *et al.*, 179 U. S., 69. This court held in that case that parties having made their contract in part only to be performed in this country could not avoid, by stipulation or waiver, a public-policy statute enacted by Congress. The Harter act under consideration in this case established a public policy within the limits of the United States to be applied to every contract (of the nature specified) made or to be performed in any part of this country, but we claim to no greater extent than the notice law of New York on contracts made or to be performed, or both, in the State of New York. There is certainly no legal or moral distinction. A public-policy statute of a State is to be given just as much effect and force within its jurisdiction or on contracts brought within its jurisdiction as the statutes of Congress have within the limits of the United States.

The facts appear in the opinion of the case by Mr. Justice Gray, as follows:

"The Botany Worsted Mills, a corporation of New Jersey, and Winter & Smillie, a firm of merchants in the city of New York, respectively owners of two separate lots of bales of wool, shipped at Buenos Ayres for New York on board the steamship *Portuguese Prince*. * * * The *Portuguese Prince* was a British vessel belonging to a line trading between New York and ports in the River Plata, Brazil and the West Indies, loading and discharging cargo and having

a resident agent at each port. The bills of lading of the wool, signed at Buenos Ayres December 21, 1894, gave her liberty to call at any port or ports to receive and discharge cargo, and for any other purpose whatever; *and purported to exempt the carrier from liability for 'negligence of masters or mariners.'*

* * * "Each bill of lading also contained the following clause: 'This contract shall be governed by the law of the flag of the ship carrying the goods, except that general average shall be adjusted according to York-Antwerp rules, 1890.' * * *

"We fully concur with the courts below that the damage in question arose from negligence in loading or stowage of the cargo, and not from fault or error in the navigation or management of the ship, for the reasons stated by the district judge." * * *

"This express provision of the act of Congress overrides and nullifies the stipulation of the bill of lading that the carrier shall be exempt from liability for such negligence, and that the contract shall be governed by the law of the ship's flag."

The language of the Harter act is no stronger in substance against the waiver of its provisions than the language of the notice law of New York is, especially as construed by the courts of New York, particularly in the case of Strauss *vs.* Ins. Co., 67 N. Y. S., 509; the same case on appeal, 70 N. Y. S., 1149; the same case in the court of appeals of New York, 63 N. E., 347, decided since this case was here before, the case being affirmed in each instance on the opinion of Justice Gaynor, rendered at the trial term, found in 67 N.Y.S., 509, or the Fischer case, to which we will call attention.

From the language of the opinion it is apparent that the contract in the Knott case was made in Buenos Ayres. The vessel was an English vessel, and it was agreed that the contract was to be controlled by the law of the flag of the ship or the English law; but it was also provided that the contract was to be in part performed in the United States, and it appeared that one of the parties to each contract was a

citizen of this country. (In this case one of the parties was a citizen of New York.) On this ground alone the court held that it was subject to the Harter act, and that the provisions of the Harter act could not be waived. The parties to the contract in the Knott case were in Buenos Ayres and had all the freedom of contract in reference to the law of the United States that petitioner and Mrs. Hill had in Washington in reference to the laws of the State of New York. Neither party need have entered into the contract unless he chose to do so. In this case neither Mrs. Hill nor the insurance company need have made the place of performance in New York unless they desired its validity to be determined by the laws of that State.

They could have provided that it should be performed in Washington. Neither party need have consented to the agreement that the contract when made should be held and construed at all times and places to have been made in New York; but both parties, desiring to subject their contract to the laws of New York, made that the place of contract and the place of performance. Having done so, they irrevocably subjected the contract to the operation of the laws of that State.

All authorities agree if a contract is made in one State parties cannot evade its public policy or a law declarative of its public policy. That was the case of Clement *vs.* Ins. Co., 140 U. S., 226. Speaking of this point, the circuit court of the third circuit said:

"Defendant puts the case on the ground that parties making a contract may under some circumstances agree for the law of a State or country foreign to the place of contract. As a general principle this cannot be disputed; but, also, clearly it has no application when the result thereof would be to accomplish an evasion of the statutory provisions declaring a rule of public policy with reference to contracts made within the jurisdiction where the legislation is enacted."

Albro *vs.* Ins. Co., 119 Fed., 629.

To the same effect is Ins. Co. *vs.* Harris, 94 Tex., 25; 57 S. W., 635.

Mr. Justice Brewer, sitting as circuit judge, who tried the Clement case, 32 Fed., 273, in the first instance, recognized this distinction and cited the following opinion of Judge Treat with approval:

"Inasmuch as the policy sued on declared that it rests on the basis of answers made to the application, and that said policy was to be issued at the home office in New York on a return thereto of the application, can the plaintiff avail himself of the force of the Missouri statutes? The defendant company was doing business in Missouri, with privileges granted to it here, when said insurance was effected. It may be that formal acceptance of the proposal was, by letter of the contract, to be consummated in New York. The broad proposition, however, remains, no artifice to avoid which can be upheld. The statutes of Missouri for salutary reasons permit foreign corporations to do business (in Missouri) on prescribed conditions. If, despite such conditions, they can by the insertion of clauses in their policy withdraw themselves from the limitations of the Missouri statutes, while obtaining all the advantage of its license, then a foreign corporation can by special contract upset the statutes of the State and become exempt from the positive requirements of law. Such a proposition is not to be countenanced. The defendant corporation chose to embark in business within this State under the terms and conditions named in the statutes. It could not by paper contrivance, however specious, withdraw itself from the operation of the laws, by the force of which it could alone do business within the State."

Fletcher *vs.* Ins. Co., 13 Fed., 526, p. 528.

In the above opinion Judge McCrary concurred.

Wall *vs.* Ins. Co., 32 Fed., 273.

Berry *vs.* Ins. Co., 46 Fed., 239.

This distinction is clearly shown by Judge Ross in the case of Nixon *vs.* Ins. Co., 81 Fed., 796, as follows:

"When the application and the applicant's money were accepted by the society the contract between the parties became complete. This was done in the State of New

York. Not only so, but as has been seen all the conditions of the policy were performed in the State of New York; the premiums were to be paid in that State; proof of loss, if any, was to be there made, and the payment agreed to be made by the defendant corporation in the event of the death of the assured was to be made in the State of New York. (All these statements of fact apply to this case.) It would seem to be very clear, therefore, that the rights and obligations of the respective parties are to be measured and controlled by the laws of that State, subject, perhaps, to any additional limitations or conditions imposed by the statutes of the State (then Territory) into which the defendant corporation went to solicit the business in question, for it may be true that every foreign corporation that enters a State other than that of its creation, and there transacts business, does so in subordination to the statutes of the State permitting its entry therein, and that no business transacted by virtue of the privilege thus conferred can, by any sort of contract, be removed from the operation of the statute of the State permitting the business to be transacted. But in the present case, as has been said, there is no Washington statute affecting that portion of the policy here in question. * * * There is nothing to the contrary in the case of Society *vs.* Clements, 140 U. S., 226, so much relied on by the plaintiff."

This case was approved by the supreme court of Missouri in the case of Cravens *vs.* N. Y. Life Ins. Co., 50 S. W., 519, in which case there was a provision in the contract attempting to make New York the place of contract to avoid the effect of a statute of Missouri. In the Cravens case the policy was actually delivered in Missouri and the court held that it was a Missouri contract, and that it would not give effect and force to a provision which would in effect and indirectly waive the statute of Missouri; but it also clearly states that if there was no statute of that character or description in Missouri, it would have held the contract to have been a New York contract.

After quoting from the opinion of Judge Ross in the Nixon case as above set forth with approval, it says:

"It is manifest from this decision that if the statute of Washington had prohibited the forfeiture of the policy upon the ground of the non-payment of premiums when due, as do the statutes of this State, the conclusion reached would have been different. The rule to be deduced from the authorities seems to be that, when no statute intervenes prohibiting it, a corporation doing business by permission of another State from that of its corporation may by contract make the law of the State of its incorporation the applicatory law of the contract, but that, when the laws of the State in which it does business by license prohibits such corporations from making certain kinds of contracts, they can only act in accordance therewith."

A brief review of the cases will show that the courts in New York and out of New York have all held alike that the notice law of New York could not be waived. Whenever courts have found enough in a contract of insurance to show that the contract was in the main or properly speaking a New York contract, they have all held a clause attempting to waive the service of the statutory notice was of no avail. We will now briefly examine those cases:

VI.

Where a contract is made in New York the service of the statutory notice cannot be waived by a provision to that effect in the policy.

It will not be necessary to discuss this point. The courts of New York have effectually settled it by holding against the validity of such a clause. It is necessary only to cite two cases from New York on this point. In the case of Strauss *vs.* Insurance Company, 67 N. Y. S., page 509, it appears that the contract was made in New York. After the policy was issued and the first premium paid, the insured defaulted in the payment of a subsequent premium. Sub-

sequent to the default, the company permitted him to pay the defaulted premium, in part by note and the balance in cash. *The note contained a condition that "the policy should be forfeited without notice to any party or parties unless paid when due."* The insurance company contended that the premium having been overdue and paid by note that the condition in the note that the policy should be forfeited without any notice, after it became due, was a good and valid waiver of the service of the statutory notice. In answer to this contention, the court says:

"It (the agreement that the policy should *be forfeited without notice*) has to be coupled with the like condition of the policy itself that the policy shall be null and void on failure to pay any premium or note given therefor on the day it becomes due, and can be given no greater force. *The statute limits the operation of such agreement of forfeiture so that they can only take effect after the prescribed notice of forfeiture. It is prohibitory and cannot be evaded.*"

The opinion in this case was affirmed by the New York supreme court on the opinion of the lower court, 70 N. Y. S., 1149, the court saying:

"Judgment affirmed with costs on the opinion of Justice Gaynor, 67 N. Y. S. 509."

This case was again affirmed by the New York court of appeals, 63 N. E., 347, the court saying:

"The only default on the part of the plaintiff was a failure to pay a part of the premium on the due day and as the defendant had never served the statutory notice, it was not in a position to work a forfeiture of the policy."

The language of the New York court is very similar to that of Judge Ross, speaking for the circuit court of appeals:

"The statute of New York prescribes the condition upon which a policy may be forfeited for non-payment of a premium. The statute is mandatory and controls the contract.

Its provisions are not subject to be set aside or waived either by the company or the assured or both together."

Nixon *vs.* Ins. Co., 81 Fed., at p. 802.

The case of Fischer *vs.* Ins. Co., 167 N. Y., 178, decided by the New York court of appeals, is also important.

The following appears under point II of Appellant's Brief, page 9:

"But conceding that the admission of the affidavit was error, it was immaterial error and not ground for reversal by the appellate division. The assured waived notice and the protection of the statute. At the time of the trial no consideration of public policy prevented this waiver from becoming effectual.

The application for insurance contained the following provision:

It is expressly agreed that the provisions of the policy for the assurance of paid-up insurance are accepted in substitution and in waivers of any law of any State relating to the lapse of forfeiture of policies of life insurance.

The policy itself contained the following provision:

Notice that each and every premium is due at the dates named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby contracted to be expressly waived.

These waivers were effectual unless reasons of public policy rendered them ineffective."

The quotations from the policy contained in the above may be found in appeal book in said case on page 9 and page 15.

The counsel then argues at length that the insured lived until after the amendment to the notice law by the act of 1897 and should be given full force and effect. They admitted that it would probably not be effective on the act of 1876 or 1892.

The court did not mention this contention in its opinion, but overruled it in affirming the decision of the lower court.

So it is clear that the highest court of New York has affirmatively held that this statute could not be waived in the two cases cited.

The supreme court of Michigan in the case of Warner *vs.* Ins. Co., 100 Michigan, 158, 58 N. W., 664, had before it a case involving an insurance contract which was made also in New York, the corporation being a Hartford insurance company. The policy contained the clause that "notice that the premium is payable to the association at Hartford, Connecticut, on the first week of each and every month, is given by the policy and accepted and any further notice is expressly waived." The court said:

"The notice sent to the insured, in the present case, did not comply with this statutory provision. The design of the statute is apparent. A policy in a regular life company fixes both the time of payment of premium and the amount thereof; yet the same statute provides that no life insurance company can declare forfeiture or lapse any policy by reason of the non-payment of any premium without notice, and prescribes what such notice must contain. It further provides that in case the payment is made within the life of the notice it shall be taken to be in full compliance with the requirements of the policy, anything therein contained to the contrary notwithstanding. These statutory provisions form a part of the contract of insurance and cannot be waived by the parties."

Warner *vs.* Association, 100 Mich., 158.

Like decisions may be found on similar statutes, where the insurance company contended as here that the parties had the right to waive them.

"The evident purpose of this legislation was to strike down, in this class of cases, literal warranties so far as they may be resorted to for the disreputable purpose of enforcing actually immaterial matters. This provides a rule of construction for the purpose of preventing injustice; and it is as much the duty of courts to enforce such rules as it is to administer the statutes of frauds and perjuries. It would be

contrary to public policy to recognize the right of parties to circumvent the law by setting up a waiver such as was insisted on in this case. The court was therefore right in holding that the — was invalid."

Hermany *vs.* Life Association, 151 Penn., 17, on p. 24.

Judge Brewer, when sitting as circuit judge in the western district of Missouri, had occasion to review this question. He says:

"Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule applicable to all cases, absolute and universal, because if it applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive, in fact, no words of negation in any direction, yet it seems to me fair to say that the affirmative language of this statute discloses a public policy which no court ought to question or refuse to enforce (Railway Co. *vs.* Peavey, 29 Kan., 169). The legislature has by this language declared a rule in respect of forfeitures in life-insurance policies; it has thus established the policy which it believes should obtain in this State, and, though sitting on the Federal bench, it is my duty to administer the laws of this State in the spirit in which they were enacted, and to uphold both their letter and their spirit."

Wall *vs.* Equitable Assur. Soc., 32 Fed., 273, on p. 277.

Overruled Cases Cited by Plaintiff in Error on Question of Waiver of the Statute of New York.

In the Phinney case counsel for the plaintiff in error cited certain authorities in support of their claim that the waiver clause of the policy overrides the statute. Certain of them have since been overruled.

The case of Insurance Co. *vs.* Curray, 13 Bush, 312, was distinctly overruled in the case of Ins. Co. *vs.* Rudwig, 80 Ky., 223, on page 235, as follows:

"And when parties have entered into an insurance contract since the adoption of this statute they must be held as contracting with reference to the statutory provision, and, we might add, subject to a like rule, recognized by this court regardless of the statute, and therefore that portion of the opinion in the case of The Farmers' and Drovers' Bank against Curray, expressing a contrary view, is overruled."

The cases of Desmazes *vs.* Ins. Co., 7 Fed., 529, and Caffery *vs.* Ins. Co., 27 Fed., 25, both relating to the law of Massachusetts passed in 1861 and holding to the effect that that statute could be waived, are disapproved, the first named specifically and the latter on principle, in the case of Holmes *vs.* Ins. Co., 131 Mass., at page 64. They are cited also with disapproval by Judge Dillon in the case of White *vs.* Ins. Co., 4 Dill., 177; also in the cases of Griffith *vs.* Ins. Co., 101 Cal., 627, and Ins. Co. *vs.* Rudwig, 80 Ky., 223, on the ground that they were contrary to the great weight of authority. If they are, as claimed by plaintiff in error, they are surely contrary in principle to the case of Clements *vs.* Ins. Co., 140 U. S., 226. It is to be noted, however, that in the Desmazes case the alleged waiver took place subsequent to the delivery of the policy, and *was supported by a new consideration*, viz., the acceptance of a new (paid-up) policy in lieu of the old. In the Caffery case the effect of the holding is that in a forfeitable policy the anti-forfeiture law of Massachusetts could not be waived, but could be waived by the parties adopting in the first instance a policy non-forfeitable in any event. The other cases cited on this proposition are so clearly not in point that we shall not discuss them.

VII.

Where parties to a contract by an agreement make the place of contract and the place of performance in a State different from that where the contract is delivered, they cannot, by inserting an agreement in the contract, waive a public-policy statute of such State.

We think we have clearly demonstrated that this court must construe the contract as the parties agreed that it should be construed, as one made in New York; that neither party at the trial were at liberty to assail, dispute, or vary the agreement of the parties that the contract was made in New York, and evidence tending to show the contrary must be disregarded.

In addition to this, both parties agreed to perform their part of the contract in New York, and for that reason the validity of their contract or any stipulation in it must stand or fall by the law of the place where each party agreed that it was made, and where they had the right to call upon the courts to enforce it and construe it. We have also shown that the highest courts of New York have held in the Strauss, Fischer, and other cases that parties could not, by an agreement made in advance of the due date of the premium, waive even in writing the service of the statutory notice. The courts uniformly hold that the invalidity of such a clause is the same where the contract is made in the State where the public-policy statute is in force or where such State is the agreed place of contract. In either event the parties are conclusively presumed to have contracted with a view to the law of the place where made and to be performed, or where they agree that it shall be considered as made and provide that it shall be performed. I feel safe in saying

that no case can be found holding to the contrary. If there was a case anywhere in the books or in any court, whether of low or high degree, the attorneys for the insurance company would surely have found it. With all the diligence they have used they have not cited a single case holding the contrary, though this is the sixth time they have urged this point before this and the lower courts. It is evident that this court so regarded *this point* when the case was here before. It was argued at great length and persistently by petitioner, consuming twenty-seven pages of the brief. It was the one common point standing at the very threshold of the Phinney, Cohen, Allen, and Sears cases commanding the attention of the court. It was the one point and only point that was common to all the cases which if decided in favor of the insurance company would effectually and for all time have disposed of each and all of them. This being true, it is fair to presume and conclude that this court did not consider the point well taken or it would have decided simply this one question and ended the whole matter, and thus have avoided the burden to itself of going into the cases at great length, writing as many opinions upon the different points as there were cases and deciding several important and difficult questions. This court would not have traveled this long and difficult route when it could have taken a short and certain one that would have ended all the cases and all the trouble both to the lower court, the circuit court of appeals, and the litigants. This court would not have sent these cases back to be tried again in the lower court and left this question to rest on the decision of the circuit court of appeals in favor of respondent if it had not agreed with that court that it was invalid.

The precise point we are discussing has been before the courts frequently. No matter where the contract is found to have been made, if there is sufficient in the contract to make New York the proper law, the courts have uniformly held that waiving clause was a nullity. The decision of the

circuit court of appeals is supported by abundant authority. In no case that we cite was the intention of the parties to make the law of New York the applicatory law more clearly expressed than in this and in many cases not nearly so much.

In the case of Insurance Company *vs.* Orlopp, 61 S. W., 336, the contract was made in Texas, to be performed in New York, and it was further provided in the contract—

"That the said contract or policy should be construed and governed by the laws of New York."

The court held that—

"*The requirements of such a statute cannot be waived by the parties.* * * * We come, then, to consider the terms of the statute just as if they were literally printed in the policy, as we are required to consider and construe any other written contract: except as it *was proved to be the statute law of New York, its provisions are mandatory and cannot be waived by the contracting parties.*"

In the case of Griesemer *vs.* Insurance Company, 10 Washington, 202, the court said:

"From these facts it would appear that this policy was issued in the State of Pennsylvania and should be governed by its laws,"

but for the fact that the policy contained the agreement that—

"This policy is a contract made and to be executed in the State of New York and shall be construed only according to the charter of the company and the laws of that State;"

Held that—

"This provision made the law of New York the controlling laws."

In the Griesemer case the policy contained the provision that—

"Notice that each and every payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy and any further notice required by any statute is hereby expressly waived."

It will be observed the two provisions are identical. It was urged in that case at length and forcibly that the contract having been made in Pennsylvania, this provision was valid and waived the service of the statutory notice. The court does not mention this point in its decision, but overrules it, in that it affirmed the lower court, which had held that the provision was nugatory. If this point had been well taken, it was the duty of the court to have reversed the case on this point.

I have had prepared and will file in this case a certificate of the official reporter of the decisions of the supreme court of the State of Washington showing that this contention was made and urged. A copy of this certificate is printed in the back of the brief and marked Exhibit "A." I have done this in order to show that the late decision of the supreme court has reference entirely and alone to a waiver subsequent to the due day of a premium, and that the supreme court, in common with other courts, has held such a waiver clause of no effect where the parties by agreement had made New York the seat of the contract.

In the case of Griffith *vs.* New York Life Ins. Co., 101 Cal., p. 627, 113 Pac., 113, in the reported case in the Pacific Reporter, it appears that the contract was in all respects made in California. The application contained the provision that the place of contract was the State of New York, and the court held it a New York contract, and that the service of the statutory notice could not be waived. It says:

"The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life in-

surance companies should be deprived of the power to declare policies forfeited for non-payment of premium, except in the prescribed mode, and that being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power in the face of the law which has taken it away."

The supreme court of Texas, in the case of Insurance Company *vs.* Smith, 41 S. W., 680, having found enough in the contract to designate New York as the proper law, held against the validity of such a clause in the following language:

"Though a policy of life insurance was issued by a New York company to a citizen of Texas, *containing a provision to the effect that, if any of the premiums were not paid when due, the policy would become void, and that notice that each premium would be due at the date named in the policy was given by the policy, and that any other notice required by any statute was thereby expressly waived, the statute of New York enacted in 1876 (requiring notice to be mailed to the assured at least thirty days before the premium was due, in order to cause a forfeiture) applied, and a notice sent 15 days before the premium was due was insufficient.*"

Other courts have decided against the validity of a clause attempting to waive the statutes of the State of the agreed place of contract. In each of the following cases the contract was in a State different from the agreed place of contract, and in each there was inserted a clause in the policy attempting to waive the public-policy statutes of the States of the agreed place of contract. In the case of Insurance Co. *vs.* Pollard, 26 S. E., 421, the contract was made in the State of Virginia, between a resident of that State and an insurance company incorporated in Ohio. The statement of the facts and the ruling of the court appear sufficiently from the following quotation:

"The defendant company was an Ohio corporation doing business in this State where the insured lived, and where

the application was made. But for the express provision in the contract of insurance that it should be 'held and construed to have been made in the city of Cincinnati, Ohio,' there might be some ground for holding that it was a Virginia contract.

"Where, however, the parties to the contract have themselves expressly declared that their contract shall be held and construed as made with reference to a certain jurisdiction, that shows by what law they intended the transaction to be governed. And, as said by Phillimore (4 Int. Law, 469): 'It is always to be remembered that in obligations it is the will of the contracting parties, and not the law, which fixes the place of fulfillment—whether that place be fixed by express words or by tacit implication—as the place to the jurisdiction of which the contracting parties elected to submit themselves.' 'In every forum,' said Chief Justice Marshall in Wayman *vs.* Southard, 10 Wheat., 1, 48, 'a contract is governed by the law with reference to which it is made.'

"There is no room for inference or presumption as to what that intention was when it is expressed in the contract (Pritchard *vs.* Norton, 106 U. S., 124; 1 Sup. Ct., 102).

"The contract of insurance having been made with reference to the laws of the State of Ohio, the plaintiff had the right to rely upon them in enforcing his contract so far as they related to its validity, nature, interpretation, and effect."

"It is therefore as much a part of every contract of life insurance governed by the laws of the State of Ohio, and made after that statute was passed, as if incorporated in it; the general rule being that laws in existence are necessarily referred to in all contracts made under such laws, *and that no waiver of the particular stipulation in the contract can change the law* (Hermany *vs.* Association, 151 Pa. St., 17; 24 Atl., 1064; Ins. Ass'n *vs.* Ficklin, 74 Md., 172, 21 Atl., 680, and 23 Atl., 197; Ins. Co. *vs.* Leslie, 47 Ohio St., 409; 24 N. E., 1072; and White *vs.* Society, 163 Mass., 108; 39 N. E., 771)."

The supreme court of Georgia, in the case of Insurance Company *vs.* Hall, 23 S. E., 849, held that a provision in the contract that "It is further expressly agreed that the place of contract is the home office of the association in the city of Boston and this contract will be governed by and con-

strued only according to the laws of the State of Massachusetts," made the contract subject to the laws of Massachusetts. In that State there was a statute providing that no company should limit the time in which an action might be commenced to less than two years. The contract provided for a less period. Held, that—

"*The stipulation in the policy limiting the time within which suit may be commenced thereon to one year from the termination of the life of the member to whom it is issued, is void, and suit may be brought thereon at any time within the period allowed by the statute of limitations.*"

The circuit court of appeals of the sixth circuit, in the case of Penn Mutual Life Insurance Company *vs.* Savings Bank, 72 Fed. Rep., 413, had under consideration a contract made in the State of Tennessee between a resident of that State and an insurance company of Pennsylvania.

"*It was provided in the policy that the place of contract shall be the city of Philadelphia, State of Pennsylvania.*"

The court, speaking through Judge Taft, said:

"There can be no doubt that this policy is to be construed according to the laws of Pennsylvania."

The company insisted that the agreement of the parties made every answer by the insured to questions propounded to him in the application a warranty, and should be construed and held warranties, according to the agreement of the parties, notwithstanding the statute of the State of Pennsylvania to the effect that when a party warranted a statement to be true in an insurance contract it could not avail the insurance company as a defense, unless the statements were untrue and material to the risk. The court held that the agreement of the parties was in violation of the statute, and that it could not be avoided or waived by any such agreement.

To the same effect as the following:

"The Pennsylvania statute enacted that whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant shall effect a forfeiture. * * * *In other words, the statute is to be entirely overthrown and set aside, and the insurance company, under the guise of an agreement, is to acquire the power to accomplish the very result which the statute intended to prevent. Statutes would be very ineffective if they could be defeated in this way.* The operation of the rule does not depend on the agreement of these corporations to adopt it as a basis of their contracts, on the contrary, the rule prescribes the scope and effect of policies of insurance, and authoritatively determines the duties and obligations which arise from the contract. * * * The contract of insurance must be made in subordination of the statute, and must have the legal effect which the statute attributes to it, and none other."

Insurance Co. *vs.* Ficklin, 74 Md., 172.

VIII.

The omission of Mr. Hill to pay the premium does not prejudice respondent's rights.

In the Cohen case this court held that, if the law of New York controlled, the declarations of Mr. Cohen or his refusal to pay would not prejudice the rights of the beneficiary, Mrs. Cohen.

This court, in deciding this case on the former hearing, left open the question of whether or not the declarations of the insured would bind the beneficiaries in this language:

"Here, as in the last two cases, is disclosed a distinct agreement on the part of the insured and the company to waive and abandon the policy and all rights and obligations on the part of the parties thereto.

"But it is said that the insured was not the beneficiary his wife, and in case of her death, their children, being named as such; and that it was not in his power, by non-payment or waiver or abandonment, to relinquish or cancel her or their rights in the policy. *It is doubtless an interesting question how far the action of the insured can affect or bind the beneficiaries in a life-insurance policy.* If the answer in this case contained simply the allegation in respect to the insured's agreement with the company, we should be compelled to enter into an examination of that question; but it is alleged, not only that the insured and the company agreed to abandon the contract, but also that *the beneficiary, his wife, and the plaintiffs, their children, 'failed, neglected and refused' to pay the premium.*"

Were it not for the decision in the Cohen case the question might be claimed to be still an open one. This question was squarely presented in the Cohen case and as squarely decided. The allegations in the answer in the Cohen case were in these words:

"And the said Alexander Cohen, on the 11th day of June, 1892, paid one-half of the annual premium due on said policy for the year beginning on the 11th day of June, all premiums due before that time having been paid, *and thereafter wholly neglected, failed and refused to pay any other or further annual premiums, or any part thereof,* upon said policy, and that no payment whatever was made by or on behalf of said Alexander Cohen of any annual or semi-annual premium due upon said policy, but the same was by him suffered to lapse and become forfeited."

See record former hearing, Cohen case, p. —.

It will be observed that the allegations in reference to Mr. Cohen are fully as broad as the allegations of Sears and Allen which, this court held, made a defense, and more broad than the allegations of the Hill beneficiaries on the former hearing. In disposing of the contention that the declarations of Mr. Cohen were binding on Mrs. Cohen as her agent, the court says:

"There was no suggestion of rescission, abandonment, or knowledge by the beneficiary of the non-payment of the premium or any refusal or failure on her part in respect to the policy. * * * This notice (the one required by the notice law of New York) was not given. Hence, if the law of New York controls, the policy was still in force and the plaintiff was entitled to recover."

The record in this case is just as free from any suggestion of rescission, abandonment, or knowledge of the non-payment of the premium or a refusal or failure on the part of respondents in respect to the policy as the record was in the Cohen case in reference to Mrs. Cohen. In fact the record in this case affirmatively shows (over the objection of petitioner) that respondents, including the guardian, were not aware of the existence of the policy until after Mr. Hill's death. Petitioner does not claim that the respondents knew of the existence of the policy or the non-payment of any premiums upon it. It does not claim to have requested any one of them to pay the premium or that any one of them ever refused to pay the premium.

This being true, the question is certainly not an open one in this case. If the decision of the Cohen case is not the law of the case, it is certainly *stare decisis*.

Mr. Cohen was as much the agent of Mrs. Cohen as Mr. Hill was of Mrs. Cohen. But petitioner says the Hill children lived with Mr. Hill. It is fair to assume, the law conclusively presumes, that Mrs. Cohen lived with Mr. Cohen. Further than this, the record shows that Mr. Smith was the legally appointed guardian of respondents; hence the only one legally authorized to speak for them, and then only in a limited way. But even he was unaware of the non-payment of the premium. It will be remembered that petitioner argued at great length that Mr. Cohen's refusal to pay was Mrs. Cohen's refusal; that all he said or did was as the agent of Mrs. Cohen. The court held in the Sears case that Mr. Sears' refusal to pay would end the contract, he being the

beneficiary; so, if Mr. Cohen's declaration that he would not pay was binding on Mrs. Cohen, she could not have recovered, even though the policy was a New York contract.

IX.

The acts, declarations, statements, or agreements on the part of the insured cannot prevail against the beneficiaries in a policy of life insurance.

We do not think it necessary to discuss this question on its merits, for the reason already stated, that this court has decided this identical question in the Cohen case. It is also a rule of law so well settled it needs no argument on our part to sustain it. In fact we think the petitioner is in no position to urge it. In the Phinney brief, which is now on file at page —, it uses this language:

"This might not apply to cases where one has insured his life for another's benefit, for, as was said in Griffith *vs.* Life Ins. Co., (101 Cal., at page 638), 'the doctrine is well settled that where a valid policy is regularly delivered in pursuance of a consummated contract to one who has procured insurance upon his own life, *payable to another*, the insured cannot surrender the policy without the consent of the beneficiary.' But if the beneficiary is the insured himself, as in the present case, his right to surrender does not depend on the consent of any one else."

If that was good law then it ought to be good law now, even though its interest in the contention has changed. In its requested instructions it asked the court, among other things, to instruct the jury:

"Plaintiffs had the right, however by virtue of their interest in the policy to have paid any premium at the time it fell due, and the defendant would have been bound to accept it. It would have been the duty of the plaintiffs or

any of them to have made tender of the amount of the premium the time it fell due" (Record, p. 162).

This confesses the whole case on this point. Under the notice law no premium was (fell) due until thirty days after the service of the statutory notice on the insured or the assignee of the policy:

"Proof of payment was not essential to plaintiff's cause of action, because, under the statute referred to, the fact of non-payment alone is no bar to her action. Only when there is evidence of non-payment of premiums, coupled with proof of the service of the statutory notice required by said section of the insurance law, can the plaintiff's cause of action be defeated. It was not necessary for the plaintiff to plead or prove the latter fact: (1) Because the courts take judicial notice of public statutes, and therefore the provisions of the insurance law which apply to this policy must be treated as though they were incorporated into the policy which is made a part of the complaint; (2) because the plaintiff is not required to negative in anticipation a fact which it may be competent for the defendant to plead and prove as an affirmative defense. Does the proof of service of the statutory notice constitute an affirmative defense? The policy was valid until duly forfeited. It could not be forfeited until the statutory notice had been given, and the thirty days therein specified had elapsed without payment of the premiums then due."

Fischer *vs.* Ins. Co., 167 N. Y., 178; 60 N. E., 431.

"The notice must state that unless the premium shall be paid within thirty days after the mailing of the notice the policy will become void. The intention is obvious from the language, that the person insured shall have thirty days within which to make payment and save forfeiture after the mailing of the notice. The policy cannot be forfeited until the expiration of the thirty days after the mailing of such notice."

Hicks *vs.* Ins. Co. (3 C. C. A.), 60 Fed., 690–693.

"The only default on the part of the plaintiff was a failure to pay a part of the premium on the due day, and as

the defendant had never served the statutory notice, it was not in a position to work a forfeiture of the policy."

Strauss *vs.* Ins. Co., 63 N. E., 347; 170 N. Y., 349.

"There is no question of pleading involved. The plaintiff was not bound to allege or prove the payment of the annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and proved non-payment after the due service of the notice required by law. * * * As the defendant was never in a position where it could insist upon a forfeiture, it becomes unnecessary to consider the question of the sufficiency of the notice served."

De Frace *vs.* Insurance Co., 136 N. Y., 144.

A mere reading of the adjudicated cases on this statute will clearly show that no premium is due, or legal right to pay is lost, until 30 days after the service of the statutory notice. No notice was ever served. So if the beneficiaries had the right to pay the premium as conceded by petitioners, that right was never lost and the policy was in full force at the time of Mr. Hill's death. When petitioner concedes the beneficiaries had the contractual right to pay, it concedes the whole case on this point. This is in entire accord with other decisions on this point.

The following are quotations from some of the decisions of the various courts and text works on this point:

"It is not quite true that a failure of the wife to pay the premiums from year to year as they became due will work this result. The statute unless waived in writing (the court should have said in writing, *in red ink*, on the face of the policy; see chapter 347, Laws of New York, 1879), provides that after the lapse of three years the reserve value of the policy, computed according to certain principles, is to be taken as a single premium of life insurance, at the published rates of the company, at the time the policy was issued, and must be applied either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance of that amount at

the age of the insured at the time of lapse, or to the purchase upon the same life, at the same age, paid-up insurance payable at the same time, and under the same conditions, except as to the payment of premiums, as the original policy (chapter 347, Laws 1879). *And no policy can be declared or treated as lapsed or forfeited until 30 days after notice* to the policy-holder."

Stokes *vs.* Ammerman, 121 N. Y., 337.

"The party insured is not a party to the record, and therefore the declarations are not admissible on that ground. She is not a party in interest, as the whole benefit and interest inured to the assured. *She is not an agent and authorized to speak for him. Nor does she come within any other rule by which her declarations can be received against him.*"

Ins. Co. *vs.* Haney, 10 Kansas, 403, by Justice Brewer.

"The insured in such a case is not a party to the record, has no interest in the policy, *and, if he is to be considered as the agent of the beneficiary in procuring it, his agency ceases* with its issuance, so that there is no legal ground upon which his statements can be received."

Grangers' Ins. Co. *vs.* Brown, 57 Miss., 308, 315.

"The offer of the defendants to prove the statements of Fish, made in the fall of 1853, in relation to his intemperate habits, was properly overruled. Fish was not, after the issuing to the plaintiff of the policy in suit, a party in interest in that contract, and could make no statement or admission that would divest the rights of the plaintiff. *He was not in any manner the agent of the plaintiff, after the issuing of the policy, and so could not bind him.*"

Rawls *vs.* Ins. Co., 27 N. Y., 282, 290.

"The statements in question, then, are the declaration of a stranger, one who is neither a party to the suit, *nor was, at the time of making them, acting as the agent of a party.* * * * *They were not admissions against interest*, for they could injuriously affect only his wife's separate property."

Fraternal M. L. I. Co. *vs.* Applegate, 7 Ohio St., 279, 293, 298.

"In this case the insured reserved to himself no power of revocation or of changing the beneficiary. It is true that he entered into no obligation to continue to pay the *premiums;* but the omission to do this did not have the effect to give him an implied power of revocation. His mother herself might continue the payment of the premium. Moreover, by the terms of the policy, after payment of two annual premiums it would not lapse, and valuable rights would still exist under it. Under the circumstances the insured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender. This seems to us to be the true rule, and it is supported by the weight of authority."

Pingry *vs.* Insurance Company, 144 Mass., 381.

"Assuming that by the policy John Lindemann was trustee for the children, it is insisted that the trust was revocable at the option of the trustee and was so far executory as to be capable of revocation; but I think it is a mistake to assume that the trust was wholly executory. It had been to a large extent executed. Every payment of premiums for 15 years had steadily added to the value of the policy as the property of the beneficiaries. The day of final payment grew nearer and the burden of premiums decreased steadily in number. Each payment made added to the surrender value and fully executed the gift to the extent of that value. What the insured had done for the benefit of the assured he could not undo without their consent, nor take from them what was already theirs and destroy the trust so far as executed."

Garner *vs.* Germania Life Ins. Co., 110 N. Y., 266; 18 N. E., 131, 132.

"To the same effect is Mr. May's text on the same question:

"'A life policy and the money to become due under it belong the moment it is issued to the beneficiary named in it, and the person procuring the insurance has no power by deed, assignment or will to surrender the policy and issue a new one, or by other act to transfer the interest to any one else. This right cannot be affected by any acts of the assured subsequent to the issue of the policy, except it be a breach of the condition. * * * No admissions of the assured

subsequently to the policy are admissible against the beneficiary.'"

May on Insurance, 3d ed., 399, L.

"While the beneficiary lives, no surrender of the policy without his consent, or non-payment of the premium after such surrender, will defeat his right. A surrender of the policy by the husband for the wife is ineffectual without her authority, * * * and although the policy may be forfeited for non-payment of premiums, yet non-payment of premiums after such an attempted wrongful surrender, without notice to the beneficiaries, will not forfeit the policy."

May on Insurance, 3d ed., sec. 399, P.

"And it is a general rule that a policy and the money that may become due under it belong the moment it is issued to the beneficiary named in it, and the person procuring the insurance has no power by deed, assignment or will to surrender the policy and issue a new one, or by other act to transfer to any other person the interest of the person named."

Wash. Bank *vs.* Hume, 128 U. S., 195, p. 207.
Glanz *vs.* Gloeckler, 104 Ill., 573.
Gould *vs.* Emerson, 99 Mass., 155.
Wilburn *vs.* Wilburn, 83 Ind., 55.
Ricker *vs.* Ins. Co., 27 Minn., 193.
Ins. Co. *vs.* Smith, 44 Ohio St., 146.
Garner *vs.* Ins. Co., 110 N. Y., 266.
Pitcher *vs.* Ins. Co., 33 La., 322.
Bacon on Ins., sec. 292.
May on Ins., sec. 399, P.
Ins. Co. *vs.* Wilke, 47 S. W., 544.

The insurance company claims that because the statute designates the party upon whose life the policy is written as the party upon whom the notice is to be served, he, for that reason, becomes the agent of all other parties interested in the policy, and his declaration of what he will do or will not do is binding upon them all, whether they are ignorant of his acts and declarations or not. We think we have fully answered that argument already. How does he become the

agent of such parties with such unlimited powers? Is there anything in the policy in this case that grants it to him? Is there anything in this record that in fact shows such power was granted to him by respondents? Is there anything in the notice law or any other law of New York that clothes him with any such power? The only authority they have for making any such claim is the fact, as above stated, that he is the party designated by the notice law as the one upon whom notice must be served. When the legislature enacted this law it found it necessary to designate some one of possibly very many interested persons upon whom this notice should be served. They could hardly require it to be served on everybody interested in a policy. So they designated the *insured in the first instance and, in case of an assignment in the second instance, the assignee. But in no event was the policy to be forfeited or declared forfeited until thirty days after the service of the notice and a failure to pay within the time limited therefor.* Let us see how this statute might and would work if their contention be correct, and the absurdity of the claim will at once be manifest. It is always presumed that a legislative body in enacting a law does it with a view to its practical operation on the subject-matter in hand, and always avoids having laws they enact work an absurdity.

Suppose Mrs. Hill had applied for the policy herself and paid the first premium out of her separate property, and died as she did before the second premium became due, leaving her minor children the beneficiaries, the owners of the policy, under the statute the company would still have been compelled to serve the notice on Mr. Hill. Yet who would maintain he was her agent for any purpose, even when alive. He could not be her agent after death. In such a case how could he become the agent of the children? Would not a court in such a case say he was simply the party designated by the statute upon whom the company should serve the notice, but never her agent for any other purpose? In such

a case who would contend that his neglect to pay or his flat refusal to pay would in any manner estop the children! The children in this case stand exactly in the same position as in the case suggested.

Suppose, again, a son of Mrs. Hill should have applied for a policy of insurance on his father's life, payable to his mother (a thing not at all uncommon), and paid the first and subsequent premiums upon it. The notice would still have to be served on Mr. Hill. Would any one say he was the agent for Mrs. Hill? Would Mr. Hill's declaration or flat refusal to pay bind either Mrs. Hill or the son, and end the policy without the service of the notice? Would not each have the contractual right to pay the premiums until they had done something or said something to preclude themselves from doing so?

Mrs. Hill would have at all times the contractual right to pay the premiums as long as the policy was in force, and under the statute that right did not cease until thirty days after the service of the notice.

The statute provides, as suggested, that the notice must be served upon the person whose life is insured, or the assignee of the policy if notice of the assignment has been given to the company. So in case of an assignment of the policy the notice must be served upon the assignee. Suppose Mrs. Hill had assigned this policy to secure a debt, leaving her a large equity in it, and notice of this assignment had been given to the company, then the notice should be served upon the assignee. The assignee in that case would be as much the agent of Mrs. Hill and the children, or Mr. Hill, the insured, as Mr. Hill was in this case. In such an event, would the declaration of statement of the assignee of the policy be binding upon the beneficiary, Mrs. Hill? Would his declaration that he would not pay the premium affect the contract as to Mrs. Hill? Would the declaration of the assignee of the policy that he would not pay the premium, or his omission to pay the premium, affect the policy as to Mr. Hill without the

service of the statutory notice? Is it not too clear for argument that in such a case the assignee is simply one of several parties interested in keeping the insurance alive, and as such is the party designated upon whom the statutory notice shall be served, and if served upon him then each and every party interested in keeping the policy alive must pay the premium within the thirty days limited by the New York statute? In a policy of this kind many persons are interested—the husband is interested in keeping the policy alive; the wife is interested in keeping the policy alive; the children and their guardian are interested in keeping the policy alive; possibly the mother or father of the beneficiary are interested in keeping the policy alive. The statute does not require that notice be served upon every one interested, but it arbitrarily designates one party interested as the person upon whom the notice must be served; and if served, every one interested in the policy must, at his or her peril, pay the premium within thirty days. But the right of these parties to pay the premium is not affected until the statutory notice is mailed and the thirty days have elapsed within which each one has a right to pay the premium. It may be that the assignee could estop himself or his executors from requiring the service of the statutory notice, but his act and declaration would only estop him; it would estop none of the remaining parties. Then when we speak of the insured or the assignee as the agent of the other parties for receiving the notice, we speak of him as an agent in the most limited sense. More properly speaking, he is simply the party designated by the statute upon whom the statutory notice must be served.

There are two cases cited petitioner from New York worth noticing. The first is that of Whitehead *vs.* Ins. Co., 102 N. Y., 143. The court had under consideration three policies, one denominated by the court as *a*. Speaking of it, the court says:

"These policies, therefore, at the moment of their execution, vested in the wife and children as the assured, under the provisions of the statute. Their interest was in the whole contract, and not merely from year to year, and so far only as it was executed (New York Life Ins. Co. *v.* Statham, 93 U. S., 24). They had the right, if the husband failed to pay the premiums, to pay them themselves, and so continue the policy in force. It is a necessary result of this ownership that the husband cannot, without the assent of the assured, surrender the policy to the company (Stilwell *v.* Mutual Life Ins. Co., 72 N. Y. 419; Bliss, Ins., sec. 348; Knickerbocker Life Ins. Co. *v.* Weitz, 99 Mass., 157;) Chapin *v.* Fellows, 36 Conn., 132. *His act in so doing is not, within the scope of the authority, inferable from his taking out the policy, and is repudiated, instead of ratified, by the claim of the insured founded upon it.*"

The court found that policy *a* was forfeited by non-payment of premium some five months before its surrender to the company.

The court says (page 153):

"Policy *a* in December, 1874, and five months before the attempted surrender, was forfeited by its terms on account of neglect to pay the annual premiums then falling due. While at the time such notice was not commanded by statute, it was required by and might be justly expected from the settled custom and habit of the insurer. In exact accord with that custom and habit it was given and if demand of the premium was needed, it amounted to such demand."

In the other two policies no notice was given and the policies were not forfeited when the surrender occurred. The notice mentioned in the following extract was evidently the statutory notice. But the company insisted that several annual premiums thereafter fell due and were not paid. Among the answers the court gave to this suggestion was that no subsequent premium notice was given. This all appears from the discussions in this case and the Frank case, which we will directly call to the court's attention. Speaking of these two policies, the court uses this language:

"The situation as to the other two policies is different in the very important particular that neither of them were forfeited when the surrender took place; and the failure to pay annual premiums occurred thereafter. As to these omissions, two things happened which, by possibility, may have prevented such payments by the assured, and for which the insurer was accountable. *No notices were sent either to the insured or to the children*, and the company, by the wrongful possession and cancellation of the policies, and by their agreement of surrender, did an act, the tendency and purpose of which was to prevent future payment by the parties interested. If the company had refused to buy in the policies of the insured, except with the consent of the insured, one of two things would certainly have taken place: either in view of their father's embarrassment, the children would have consented to the surrender, taking as their own the surrender value which belonged to them, or they would have kept the policies in life by themselves paying the premiums. More than that was the interest of the assured, and greater than that their loss by the unauthorized act. They can only obtain full redress by a recovery of the amount insured, less the unpaid premiums and interest."

That the notice mentioned in the Whitehead case was the statutory notice more clearly appears in the case of Frank *vs.* The Mutual Life Ins. Co., reported in the same volume (102 N. Y., 278), decided the same term, and argued by Mr. Davies, who is on the brief of petitioner here. The court says:

"It is in this respect (in the case the court is deciding, the insurance company had sent the statutory notice) that the present case differs decisively from Whitehead *v.* New York Life Insurance Company, *ante*, 143, recently decided. In that case we held that the non-payment of the premiums, after the surrender of the policy was occasioned in part by the wrongful act of the company in accepting a surrender from one having no authority to represent the assured, and that the insurance company participated with the husband in keeping his wife and children in ignorance of their rights. In the present case, accepting the surrender was not, as we

have said, a wrong to the plaintiff; nor was she in any manner kept in ignorance of her rights, or prevented by any act of the company from continuing her payments; *nor had the company in the case last cited (Whitehead case) given to the assured the notice required by the act of* 1876 and which was essential to *entitle it to terminate the policy.*"

Further on the court used this language:

"The exception taken by defendant Demond to the exclusion of evidence that in August, 1876, when he paid the premium due July 21, 1876, the secretaay of the insurance Co. informed him that the policy had lapsed, but, that if he, Demond, would pay the premium already due, the company would revive it for his benefit alone, was not in our judgment well taken. * * * *But there was no proof that it had been forfeited at that time, as it does not appear that* 30 *days' notice required by chapt.* 341 *the Laws of* 1876 *had then been given.*"

So it will be seen that, instead of the Whitehead case being an authority against us, it is with us. That case, together with the Frank case, clearly show that it was the opinion of the court of appeals of New York that where a wife and children were ignorant of the existence of a policy their right in it could not be terminated except by service of the notice.

These cases are in entire accord with Stokes *vs.* Ammerman:

"*It is not quite true that the failure of the wife to pay the premiums from year to year, as they become due, will work this result (forfeiture)* * * * *And no policy can be treated as lapsed or forfeited until* 30 *days after the notice to the policy-holder.*"

The case of Schneider *vs.* Ins. Co., 123 N. Y., 109, cited by petitioner, does not support its claim. In that case the statutory notice was served and the wife failed to pay within thirty days. This is shown in the opinion of the court. It says:

"On the 15th day of March, 1886, defendant duly served the notice required by the statute that another premium

would fall due on the 17th of April following. This notice was served upon the husband who had the policy in his possession, and who was the agent of the wife for the purpose of receiving the notice (Laws of 1877, chap. 321). This premium was not paid and no notice was thereafter served by defendant. * * *

"The premium due on the 17th day of April, 1886, was not paid. The notice required by the statute was served on the 15th of March preceding, and the existence of the policy as a valid contract of insurance, and liability of the defendant thereon, depended upon the performance of the condition. The fraudulent surrender of the policy by the husband before the April premium became due in no way excuses the failure to pay the premium, unless the defendant was in some way connected with that fraud, or guilty of some negligent act in regard thereto."

The court held that company, having served the statutory notice, was not guilty of any negligent act; that it had done all that was required by the notice law and could insist on a forfeiture.

The case of Holmes *vs.* Gilman, cited by petitioner, has no bearing. That was a case where the husband procured a policy payable to his wife. He paid all the premiums from trust funds. The controversy was between the wife and the *cestui que trust* as to who should recover the proceeds of the policy. The court held that the husband could not purchase a policy for his wife, pay the premiums out of trust funds, and the wife hold the proceeds against the *cestui que trust*. The use of the word *agent* must be considered in the light of those facts.

X.

An infant cannot appoint an agent. Certainly one does not become an agent of an infant because he lives in the same house with him.

We do not think it necessary to discuss this point. The contention of defendant that Mr. Hill became the agent of these respondents because they lived with him surely needs no answer. Of course, Mr. Hill might procure insurance for them on his life. In that limited sense he might be and frequently is mentioned as their agent in doing so—that is to say, his act is regarded as being done for them; but that would give him no authority over the contract after it was made. The only person who can act for an infant so as to bind him or his property is the lawfully appointed guardian by a court having jurisdiction of the property and person of the infant, and he may only act in accordance with the law under which he is appointed under the order and approval of the court appointing him.

Mr. Mechem, in his work on Agency, section 51, says:

"It has been the settled doctrine of the law that an infant cannot empower an agent to act for him. The reason on which this rule depends has been well stated. The constituting of an attorney by one whose acts in their nature are voidable is repugnant and impossible, for it is imparting a right which the principal does not possess,—that of doing valid acts. If the acts when done by the attorney remain voidable at the option of the infant, then he has done through the agency of another what he could not have done directly—binding acts. Such personal and discretionary legal capacity as an infant is vested with is, therefore, in its nature, incapable of delegation.

"But if the consideration suggested as the foundation of this rule be not satisfactory, the rule is well established by a conclusive weight of authority."

Mr. Story in his work on Agency, section 6, says an infant is *wholly incapable* of appointing an agent.

The rule is well established that an infant may make a contract and affirm or disaffirm it on coming of age, but that an attempt to appoint an agent is not voidable, but wholly void. (See citations in Mechem on Agency, sec. 51.)

XI.

The doctrine of laches does not apply to an infant.

The supreme court of Pennsylvania says:

"The defense of the plaintiffs' laches is untenable. They were minors at the time of the transaction and no laches can be imputed to them until after their arrival of age. After that period they had 21 years to assert their rights."

Spencer *vs.* Jennings, 139 Pa., 198.

"Laches are not to be attributable to an infant (Dragoo *vs.* Dragoo, 50 Mich., 575). The law assumes that complainant was ignorant of her rights during her minority, nor can the neglect of her mother to act for her deprive her of any right under the statute."

Putnam *vs.* Tinkler, 83 Mich., 628.

"It is a maxim of law that laches or neglect is imputable to an infant *durante minoritate*, because he is not supposed to be cognizant of his rights nor capable of enforcing them. The staleness of demand or transaction is no prejudice if infancy occur; and no presumption is indulged against an infant by lapse of time."

Tyler on Infancy, 2d ed., p. 167.

Neither is laches imputable to one ignorant of their rights. Mr. Wood says:

"But a person who has not complete knowledge of the facts cannot be said to acquiesce, and I do not see, say Turner, J., how a man can be said to have acquiesced in that he does not know; and in cases of this sort I think

that acquiescence implies full knowledge, for I take the rule to be quite settled that a *cestui que trust* cannot be bound by acquiescence, unless he has been fully informed of his rights and all material facts and circumstances of the case."

Wood on Limitations, 1st ed., sec. 61.

XII.

One cannot enforce an estoppel against a minor.

This rule does not need argument to support it.

This court, in the case of Sims *vs.* Everhardt, 102 U. S., 300, uses this language:

"The question is, whether the acts and declarations of an infant, during infancy, can estop him from asserting the invalidity of his deed after he has attained majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An *estoppel in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be equivalent for actual capacity. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or his age adds nothing to what is implied in his deed. An assertion of estoppel against him is but a claim that he has asserted or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed."

To same effect see Field on Infants, sec. 17.

XIII.

The contention that this company is a mutual one, and that one construction of the statute must be given it for that reason and a different one apply to a stock company is untenable.

The statute says no life insurance company doing business, etc., shall forfeit a contract except on prescribed conditions.

There is certainly nothing in the statute suggestive that it was intended to apply to one class of old-line life insurance companies and not to another. Before a court would hold that a statute of this character would be enforced to its full intent and meaning against a joint stock insurance company and not against what petitioners call this, a mutual insurance company, it must find its justification in some language of the act. We can find nothing of that kind in the statute under consideration, nor can we see any reason for such a distinction. It is common knowledge that all the large companies operate on the same plane. In theory at least, the policy-holders all participate in the profits. The Equitable Insuranse Company has $100,000 paid up stock, yet it may only pay to its stockholders 7 per cent. per annum dividends. The charter under which it operates requires the balance of the profits to be distributed among its policyholders. What is true of it is largely true of every other like insurance corporation in which stock is held by individuals. It is also common knowledge that the great majority of insurance is written by corporations that are equally mutual insurance companies with this one. There is no reason why the statute should apply against the one corporation and not the other. The rights under a contract issued by a corporation to one a stockholder must be

construed and enforced just the same as with one not a stockholder.

A stockholder in a contract between himself and the corporation ordinarily cannot claim any special privilege or exemption on his contract simply because he is a stockholder. A stockholder in a bank that becomes insolvent may have a large deposit in the bank and may have put it there for the purpose of keeping it solvent without any legal duty to do so, yet his rights are exactly those of any other depositor. A policy-holder in an insurance company may make a contract with it to build a building; his contract is construed just the same as it would were he not a policy-holder and would not share in the profits of the company. A policy of insurance with an insurance company, where the policy-holder shares in the profits, is construed exactly as it would be with a company where he does not share in them. We know of no case where any distinction has been made; a breach of warranty would be the same in either case; a failure to pay a premium would be the same in each case. In construing such a contract courts do not stop to inquire whether or not a policy-holder is sharing in the profits. As to the contract, each is supposed to deal at arms' length. Each has a right to obtain the very best contract, the most favorable contract possible. In such a contract either party has a right to require of the other a strict fulfillment of the contract according to its terms, subject to the law controlling it. The fact he may or may not be a sharer in the profits does not change the law applicable to it unless the law clearly so provides.

XIV.

The contention of petitioner that the statute would not keep a policy alive after more than one default, or that it only applies to residents of New York, is contrary to the true meaning of the law and the adjudicated cases, including that of this court in the Cohen case.

The petitioner contends now, as it did when this case was here before, that the statute only applied to one default and only applied to residents of New York who had a post-office address in New York, regardless of when the contract was made. It also urged that the petitioner was a mutual insurance company, and that a party could not enforce a contract against the corporation, and consequently against other policy-holders, unless he first showed he had paid the stipulated premiums. This same point was urged at great length in the Cohen case. The decision in the Cohen case holds flatly against this contention. In the statement of the case Justice Brewer uses this language:

"On June 10, 1885, the petitioner delivered to Alexander Cohen, in the State of Montana, a life-insurance policy for $3,000, conditioned upon the annual payment of a premium of $89.61. Upon it the insured paid premiums up to and including June 10, 1892. No subsequent premiums were paid. On Sept. 21, 1897, he died. His wife, Tine Cohen, was the beneficiary named in the policy."

This court thus calls attention to the fact, clearly and explicitly, that in the Cohen case five and one-half years had elapsed after the premiums were alleged to be due under the terms of the policy, or, as contended by petitioner in that case, there were eleven semi-annual defaults made. The first alleged default was two years longer than in this case.

In the Cohen case the first default was June, 1892. Cohen died September, 1897, almost five and a half years later. In the Hill case the first alleged default was April, 1887. Hill died December, 1890, or about three and a half years later.

Keeping this in mind, this court in the Cohen case said:

"The single defense was the non-payment of premiums after June 11, 1892. There was no suggestion of rescission, abandonment, knowledge by the beneficiary of the non-payment of the premium, or any refusal or failure on her part in respect to the policy. * * * This notice (the one required by the New York law) was not given. Hence, if the law of New York controls the policy was in force and the plaintiff entitled to recover. The question therefore is whether the law of New York controls."

The contention there, as here, was that, even if the law of New York controlled, Mrs. Cohen could not recover, because the demurrer admitted that the premiums had not been paid for over five years; but the court overrules that contention and says there being "no suggestion of rescission, abandonment, or knowledge by the beneficiary of the non-payment of the premium" (just the case here), if the law of New York controls, the beneficiary was entitled to recover. So the defense here, that the premiums were not paid for over three years, is not well taken. If the decision in the Cohen case (it being argued at the same time and in the same brief with this) if not the law of the case, it is *stare decisis*. If Mrs. Cohen should recover in that case, if the law of New York controlled, the Hill beneficiaries should in this case, as we have demonstrated the law of New York does control.

If this was not a closed question the result would be the same. The fact, if it be a fact, that this company is a mutual life insurance corporation, we think, cannot change the rule that a policy issued by it is not forfeited until the statutory notice is served, or the parties by mutual agreement end the contract. This may be by agreement or by conduct presupposing such an agreement. In this case it is admitted that

contract was not ended by the company sending the statutory notice, and a failure to pay thereafter. *It was not forfeited.* In this case there is no contention it was ended by the mutual agreement of the parties. There is no contention that the respondents ever said or did anything that estopped them from enforcing the contract. It is admitted that respondents did not know of the non-payment of the premium; in fact, it affirmatively appears that they did not know of the existence of the policy. They could not abandon a policy which they did not know was in existence. They did nothing, said nothing, which closes their mouths from speaking the truth or insisting on any right in the contract. On the other hand, the company knew of their vested right in the policy. It knew that their interest in the policy could not be ended without either service of the statutory notice and a failure to pay thereafter, as provided by the statute, or by an agreement with them to end the policy, or by conduct on their part amounting to that after knowledge of their rights and duty in the premises. This court clearly held in the Cohen case, as we have shown, that a mere omission to pay the premium by the beneficiary, especially where she was unaware of the non-payment of it, would not cut off her rights. The statute reads this way:

"No life insurance company doing business in the State of New York shall have power to declare lapsed or forfeited any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. * * * In case payment demanded by such notice shall be made within 30 days limited therefore *shall be taken in full compliance with the requirements in respect to the payment of said premium or interest*, ANYTHING THEREIN (the policy) TO THE CONTRARY NOTWITHSTANDING. *But no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of 30 days after the mailing of such notice.*"

The simple reading of the statute is a complete answer to petitioner's argument that it was the duty of insured to pay

before the service of the statutory notice. No language could be plainer. The forfeiture is made entirely dependent upon the service of the notice. Under it the company could secure the payment of the premium or forfeiture of the policy within thirty days at any time it saw fit to demand the premium in pursuance of the statute. It was not helpless under the statute. Its rights were well defined. Did it ever undertake to end the contract in accordance with the statute? It admits that it did not. Whose fault is it that it did not get the premium or obtain the right to declare the policy forfeited? Certainly the fault of no one but itself. Did the respondents say anything to it that prevented it from serving the notice? It makes no such claim. Were they aware that the company was claiming a forfeiture? The contrary is the undisputed evidence in the case.

The authorities are all of one accord that under such circumstances the contract continues as a valid and existing contract until after the service of the notice, as the following extracts from adjudicated cases will show:

"The effect of the statute was that, after a policy had once been issued, *no act of the insured by way of omission to pay the premium could of itself work a forfeiture of the policy.* So far as it was concerned, the contract was a permanent one until some act of the defendant had been done by way of putting an end to it. Therefore, when any one entitled to sue upon it had occasion to bring an action, he was not compelled, as a condition of making out his cause of action, to show that the payment of the premiums had continued after the policy had once taken effect, because by the express terms of the statute, *the policy remained a valid instrument between the parties until, after a default in the payment of the premiums, the company had served the notice and taken certain action which was prescribed by this statute.* As was said by the court of appeals in Baxter *v.* Insurance Co., 119 N. Y., 450, 455, 23 N. E., 1048, the contract is not impaired by a failure to pay the premiums on the day fixed, but by a failure to pay within 30 days after the statutory notice had been served. The statute prescribes this notice as a necessary condition of forfeiture, and, unless it was served, the insured was not in

default, because payment within 30 days after the notice is to be taken as a full compliance with conditions.

"Before the defendant could raise any question in regard to the non-payment of the premium, it was necessary to show that it had complied with the statute by serving the notice, as this step was essential to put the insured in default or to raise any point based on his omission to pay the premium.

"No one would claim that it was not necessary to allege in this affirmative defense that there had been a failure to pay the premiums. But a failure to pay the premium is no more necessary to constitute the forfeiture than the service of the notice; and if it was necessary to allege one, it just as clearly was necessary to allege the other. Under the rule laid down in the case last above cited, the affirmative defense must have been set up before the defendant could have any benefit from it. It was not sufficient to set it up in part, but it must be fully set out in the answer, so that the plaintiff might know precisely what was claimed to constitute a forfeiture. All that she was notified of by this answer was that her husband had not paid the premium. Looking at the statute, she must have known, of course, that that was entirely insufficient to warrant the forfeiture of the policy, and she was entitled to stand upon that insufficiency, in the absence of any allegation that the notice had been served, which put upon him the duty of paying it within thirty days. Indeed, the allegation of notice was the much more important of the two, because that was the transaction which put Wilhelm Fischer in default, and of which, in the nature of things, this plaintiff could have had no knowledge or any intimation of its existence unless it was set out in the answer."

Fischer *vs.* Ins. Co., 56 N. Y. S., 260.

This case was affirmed on appeal, the court saying:

"Proof of payment was not essential to plaintiff's cause of action, because under the statute referred to the fact of non-payment alone is no bar to her action. Only when there is evidence of non-payment of premium, coupled with proof of service of the notice required by said section of the law, can plaintiff's action be defeated (Fischer *vs.* Ins. Co., 167 N. Y., 178).

"It was not necessary, in order to enable the plaintiff to recover the sum insured, to pay or tender before action the premium that was payable on the 24th day of August prior to the death of insured. If the policy was in full force when the assured died, as we think it was, that event fixed the liability and obligation of the defendant, notwithstanding the omission to make that payment. Nothing remained to be done by the widow of the insured, or her assignee, except to present to the defendant the proofs of death required by the policy. The death of the assured terminated the contract. The defendant's promise to pay, if it was not discharged, had matured, and the person entitled to the benefits of the policy had only to establish the facts of death within the time and in the manner prescribed therein. The contract was kept in life, by force of the statute, until the contingency upon which payment depended occurred. The death of the assured created the relation of debtor and creditor between the defendant and his widow, and the unpaid premium, with interest from the date when payable, was a claim to be deducted by the defendant from the sum due upon the policy. This put the defendant in precisely the same position in which it would have been if the premium had been duly paid (Carter *vs.* John Hancock M. Life Ins. Co., *supra*). It was conceded upon the argument in this case that the unpaid premium, and interest thereon, was deducted from the verdict, and thus no injustice has been done."

Baxter *vs.* Ins. Co., 119 N. Y., 450.

"There is no question of pleading involved. The plaintiff was not bound to allege or prove the payment of the annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and proved non-payment after the due service of the notice required by law. * * * *As the defendant was never in a position where it could insist upon a forfeiture, it becomes unnecessary to consider the question of the sufficiency of the notice served.*"

De Frace *vs.* Insurance Co., 136 N. Y., 144, p. 151.

"The only default on the part of the plaintiff was a failure to pay a part of the premium on the due day, and as the

defendant had never served the statutory notice it was not in a position to work a forfeiture of the policy."

Strauss *vs.* Ins. Co., N. Y., 63 N. E., 347.

The Strauss case was decided since the case was here. In it notice was served on the insured, but not upon the assignee of the policy. In it, it will be remembered, the note given in payment of the premium in question contained a clause specifically and expressly waiving the service of the statutory notice. This note was given in payment of a premium overdue. (See decision of lower court, 67 N. Y. S., 509.)

XV.

The legislature of New York had the power and did provide that no policy of insurance should be forfeited without the prescribed 30-days notice.

No one can read the decisions heretofore cited and quoted from New York without coming to the conclusion that the highest courts of that State have held the law in question prohibited the forfeiture of an insurance policy in that State without the service of the statutory notice. This being true, those decisions are binding on this court, unless the act in question is unconstitutional. Even then no error is assigned on that ground. In fact, no one will contend that the legislature of New York had not the power to make the forfeiture of any policy conditioned solely on the service of such a notice and provide that the policy would be a continuing one until such notice was served.

Every member of a mutual life insurance company when he becomes a policy-holder enters into an agreement and understanding, if not actual, at least implied, that the corporation itself will make other contracts with other people along the same general line. He consents and agrees in law that the corporation, acting by its officers,

shall make valid and existing contracts with such anticipated policy-holders. He trusts to the officers of the corporation to make valid and profitable contracts. Such policy-holder gets the benefit of contracts thus made. While getting the benefit of contracts so made he must stand his share of the burden of such contracts. He must share in the losses incident to the business, as well as share in the profits. As a policy-holder he has a right to insist upon the company enforcing the provisions of a contract in favor of the corporation. As a policy-holder he has no right, unless the contract be *ultra vires*, to ask a court to ignore the provisions of a new contract favorable to the new policy-holder. As a member of the corporation he can ask nothing further than that the corporation live up to the contracts it makes with other policy-holders, and demand of each other policy-holder that they live up to the provisions of the contract. No one will contend that a legislature that grants to a corporation of this kind a charter enabling it to write life insurance might not insert in such charter a provision to the effect that no policy could be forfeited until it served a prescribed notice in a prescribed way. In such case each policy-holder contracts with the corporation with the understanding that his policy and any other policy it might write would be subject to the provisions of the charter and would not be forfeitable except by the officers of the corporation complying with such provision. Every party who contracts with a corporation of this kind does it with the knowledge and understanding that a legislature may require of such a life insurance corporation, as a condition of forfeiture, the service of such a notice, and that if the legislature chooses to enact such a law no contract will be forfeitable unless notice is served.

No policy-holder has a right to demand in such a case that the policy of another member of the association shall be forfeited in any other manner than provided by such an act. Each policy-holder has the protection of such legis-

lation. Each policy-holder may claim it and rely upon it, and no policy-holder has the right to ask of another policy-holder to surrender a right that each may demand and claim. Take the strictly mutual benefit associations, for example, where the trustees or officers are compelled to make assessments to pay death losses. So far as I am aware, in every instance, by the laws controlling the organization, a notice is required to be served on each member. It has never been claimed, so far as I am aware, that a member loses his policy unless he has first been served with a notice stating the amount of the assessment. No member of such an association has a right to ask that a policy of a member cease until the requisite notice is served, and if the officers of the association fail and neglect to perform their duties, then the association itself must suffer the loss, because the agreement is mutual and based on the agreement and understanding that no one shall lose his membership or his insurance except on the condition of the service of the prescribed notice.

I have never known of a policy-holder who was worried for fear that an insurance company which had issued to him a policy would not forfeit enough of the contracts of his brother policy-holders. The suggestion that there might be such a one is something new and novel. I have never heard any one suggest that a company did not insert in its policy a sufficient number of harsh forfeiture provisions and did not enforce them with sufficient promptness.

If the officers of the association fail to demand and secure the payment of a premium from a policy-holder, such as a statute or by-law of the association requires, the complaint must be made against the officers of the association, not the member. Each member looks to his contract and the by-laws, or, in case of some controlling statute, to the statute as defining his rights; no member loses any right in his contract of insurance as long as he pays his dues in entire accordance with the contract, the by-laws, and statute con-

trolling. No member may complain of another so long as he pays all premiums legally required of him. No one is in default as long as he pays his premiums in entire accord with his contract and a controlling statute. No one has a right to ask a member to lose his contract until he can show he has violated it. If a notice is a condition precedent to a forfeiture, no policy-holder is in default until it is served.

The notice law of New York is not harsh nor unusual. Similar laws have been enacted in a number of States to protect the policy-holders. Nearly all of the courts that have been called upon to pass upon such laws have spoken of them with favor. The notice law of New York does not prevent the company from forfeiting a contract on the day stipulated for the premiums to be paid, but provides easy and simple methods of terminating insurance contracts unless the premiums are paid. This case is not at all similar to the Statham case, where each party was prevented from living up to the terms of the contract by war. In that case no question of notice was involved, but I feel certain that if the life insurance company interested in that case had been required to serve a notice of forfeiture as a condition of forfeiture of the contract, and then, the war intervening, not being able to serve their notice, they would have been compelled to suffer instead of the policy-holders, but the contract in those cases required the insured to pay the premiums on the day served, and if not paid on that day the policy was to be forfeited. The court held that, while it was true they could not pay, still the burden was upon them to pay, and the contract ceased. Again, in this case, the corporation is defending. No policy-holder has intervened and asked to be protected in this case, but the issue is here between the corporation itself and the plaintiff. The corporation is defending as any other corporation would defend. The policy-holders themselves are making no defense nor asking to intervene in their own behalf.

XVI.

Law of the Case.

On the second hearing the circuit court of appeals used this language:

"The decision of this court on all other points (points other than the alleged but unproved abandonment) not having been criticized or reversed is now the law of the case for this court."

We have no doubt but that the above rule is correct in law. It certainly ought to be the law and the practice. If we are right in saying it ought to be the law, this court will so declare it. The circuit court of appeals being established for the sole purpose of finally deciding specified classes of controversies (this is of one class), it certainly must follow its own decisions in all cases except where it is subsequently reversed by this court. If it would have other people respect its decisions or be controlled by them, it must respect and be controlled by them itself until such time as this court announces a different rule.

It is well established that the decision of a circuit court of appeals on a first appeal is the law of the case on a second hearing, providing it has not been removed to this court by a writ of certiorari or otherwise. The different circuit courts of appeals have so held in the cases of Matthews *vs.* Bunk, 100 Fed., 307; R. R. Co. *vs.* Carroll, 84 Fed., 772; Supreme Lodge *vs.* Lloyd, 107 Fed., 70; Cable *vs.* Ins. Co., 111 Fed., 19. Many other cases might be cited.

That these decisions are correct we have the authority of this court in the case of Panama R. R. Co. *vs.* Napier Shipping Co., 166 U. S., 28044; law ed., 1004.

"It is claimed that, upon this hearing, we are limited to the question of damages, for the reason that the writ of certiorari was issued after the decrees of the district and circuit

courts, dismissing the libel upon the merits, had been reversed, the case remanded to the circuit court to assess the damages, a final decree of the circuit court for $38,861.86, and a second appeal to the court of appeals, which had pronounced an opinion affirming the decree of the circuit court, although no formal decree seems to have been entered at the time the writ of certiorari was issued. * * *

"If, under such circumstances, this court were powerless to examine the whole case upon certiorari, we should then be compelled to issue it before final decree, whereas, as was recently said in the case of the Conqueror (*ante* 514), it is and generally should be issued only after a final decree. * * * *But while the court of appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitation applies to this court, when, in the exercise of its supervisory jurisdiction, it issues a writ of certiorari* to bring up the whole record. Upon such writ the entire case is before us for examination."

To the same effect is Smith *vs.* Vulcan Iron Works, 165 U. S., 518–541, law ed., 810:

"In the second case, it was argued, in support of the petition for a writ of certiorari, that the circuit court, upon receiving the mandate of the circuit court of appeals directing a dismissal of the bill, erred in entering a final decree accordingly without further hearing; and that the circuit court of appeals erred in dismissing an appeal from that decree. But the rule to show cause did not proceed upon that ground. And the merits of the case having been once determined by the appellate court in reversing the interlocutory decree, were not open to reconsideration at a later stage of the same case, either in that court or in the court below."

This court held in the Panama case, just cited, that while the decision of the circuit court of appeals was binding on it on the second appeal, yet its first decision, and consequently second decision, was not binding on this court. This for the reason, clearly stated, that until after the second hearing (the first decision not being a final one) this court had no opportunity to examine the decision on the first hearing,

because it would not issue its writ of certiorari until a final decision of the case. But that is a very different state of facts from this. This case was here once before, and this court had full opportunity and, as we think, duty to decide every point in the case wherein it differed from the circuit court of appeals. This court issued the writ presumptively for the sole purpose of settling important questions in the case, to revise the decision of the circuit court of appeals in so far as it needed revision to correctly state the law.

The rule, then, is established that the decision of a circuit court of appeals is the law of the case on a second hearing when it has not been removed here on writ of certiorari.

Would the rule be changed when the case had been removed here by writ of certiorari as to those points it did not decide and upon which it expressed no opinion? We think not. If not, the first ruling of the circuit court of appeals would control it on the second hearing. Yet certainly its former ruling would not bind it to one course and leave another course open to this court. That which controls the one court on a second hearing certainly controls the other. Then let us see if, on reason or authority, the circuit court of appeals in the second appeal is bound by its decision as to the first on points not reversed by this court.

As we have said, the law establishing the circuit court of appeals made it a court of last resort. Its whole duty is to review decisions of lower courts. After a decision once made in a case and its mandate issued, it is powerless to review its own decision. Its decision may be reviewed by this court, and, in so far as this court overrules it, the decision of this court to that extent abrogates and supersedes that of the circuit court of appeals, but, we think, no further. The decision of this court does not change the fact that what remains of the decision of the circuit court of appeals is a decision of an appellate court controlling on the circuit court. Where this court exercises its supervisory power by use of the writ of certiorari, it certainly takes the decision of the

circuit court of appeals, much like it does a decree in chancery on appeal, to modify it and correct it, if necessary, so that the case may be finally ended upon the second trial, if anything remains to be tried.

An announced rule by the circuit court of appeals is binding upon it as *stare decisis* until this court has announced a different rule. Any point decided in the Hill case would be binding on it in another case until this court, in the same case or different case, had reversed it on the particular point. Parties entering into contracts, attorneys advising clients on contracts already entered into within the territory reached by a circuit court of appeals, have a right to rely on the decision of their circuit court of appeals as controlling, as much so as they have upon the decision of the highest court of their State (with the exception noted), which by the law of the land is made the final arbiter of any controversy arising over their contract. Any other rule would make the decision of such courts a snare and delusion.

Of course if the case had never been before this court, as in the case of Panama R. R. Co. *vs.* Shipping Co., *supra*, the decision of the circuit court of appeals would be binding thereafter only on it and the lower court on the second trial.

When this court on the former hearing of this case had this matter before it, it decided it in view of the decisions already made and in view of the course the litigation would take in the future. It decided it knowing that neither party would in the future have a right of further review here unless the lower court should refuse to carry out its mandate. It knew the lower court would necessarily first look to the decision of this court to see what this court decided as binding upon it. It would then necessarily look to the next highest decision, that of the circuit court of appeals, to see what it had decided, and which had not been criticised or reversed by this court. It certainly could not disregard the decision of the circuit court of appeals on such points. It would have no right to assume that this court expected it to

ignore the decision of the circuit court of appeals on unreversed points; yet that would be exactly the result if it failed to follow that court on such points. This is strengthened by the fact that the circuit court of appeals in case of appeal would be the next and presumptively the final court to review its action.

If this court would reasonably expect the lower court to so regard the decision of this court, then it amounted to a command by this court to do so, and it committed no error in so acting. What other course could it take within reason or in regard to proper administration of the law? What other view would be compatible with common sense or duty? It could not ignore the court of appeals on questions it had deliberately decided and which this court did not reverse. As we have said, that court was established solely for the purpose of reviewing decisions of the different circuit and district courts. If its unreversed decisions are not binding on such lower court, it is worse than a useless and very expensive machine. This court also decided this case necessarily with a view to how the circuit court of appeals would construe its decision when again required to do so, in order that it might correctly decide the case. It must review the whole case—this court's decision together with its former decision—in the light of what this court in reason and in the orderly administration of the law would expect it to do. This court decided the case in view of what already had been decided, and in view of the construction of its opinion that intelligent jurists would place upon it who were called by law to give it effect and force. This court would act on the theory that its decision would be construed in the light of the law establishing the circuit court of appeals, clothing it with all the dignity and power and giving its decision all the force and effect of an appellate tribunal, with a supervisory control only in itself. It certainly would not assume that the circuit court of appeals would not follow its former ruling on a point that this

court had failed to suggest as error. It certainly would expect the circuit court of appeals to do the natural thing, to do the thing which in all fairness it ought to do—follow its own conclusions, reached after care and deliberation, and which this court did not deem of enough importance to suggest as error or even an important question. For illustration, the petitioner in the circuit court of appeals, and were urged with great persistency that respondents had no case on the record, as they had plead performance, and the petitioner had in its affirmative defense plead specifically that respondents had not paid the second and third premiums, which was admitted by the demurrer to this affirmative defense. The circuit court of appeals held this defense not good, because petitioner had not alleged that it had served the statutory notice, which was a condition precedent to its defense of non-payment. The circuit court of appeals, after careful deliberation, on reason and authority, held this point not well taken. This court in its opinion never mentioned this point. Did not the circuit court of appeals have a right to and was it not its duty to assume by the silence of this court it impliedly affirmed it? This court, in all fairness to the litigants and to the court of appeals, would certainly expect the court of appeals and litigants to so regard its silence on that point. If that be true, we say it was binding on the circuit court of appeals to so regard the point and refuse to open it up for further review. If the circuit court of appeals should in reason so regard the silence of this court, it certainly was its duty to follow its former ruling. Could it fairly and as reasonable men regard this court's silence in any other way?

The mistake petitioner makes in arguing this point is in undertaking to apply the rule and practice which prevails in appellate courts in considering a case from a *nisi prius* court, whose decisions never are final. That is not the case. When this court was reviewing the decision of the court of appeals it was reviewing the decision of an appellate court,

upon whom the doctrine of the *law of the case* applied and whose next decision would presumptively be final. This court could not decide the case or review the decision of the court of appeals on the theory or assumption that either party could again remove it here as a matter of right. Neither party had as a matter of law any such right of review. This court in such a case could not pass over a point without deciding it on the assumption that if the circuit court of appeals re-erred it would naturally come here again for further review. Yet this court would expect the court of appeals to err again, if it erred at first, if this court did not correct it. So the rule that would prevail as between this court and a *nisi prius* court would not as between this court and a circuit court of appeals. Nor is it the practice of appellate courts in reviewing the decision of a *nisi prius* court to leave undecided questions which must or probably will again come up on retrial, especially if the disposition of them will necessarily end the case. The practice is just the contrary. This is well illustrated by the case of Oleson *vs.* N. P. R. R. Co., 119 Fed., 77.

"The circuit court upon the second trial (106 Fed., 298) so understood it, and upon deciding the motion for a new trial remarked: 'Under no circumstances should I feel warranted, upon a second trial, in departing from the course pursued in the former trial, where that course had been a ground of objection on appeal, and in respect to which this court, if not sustained, had at least not been overruled nor criticised.' We think the trial court was justified in regarding the decision of this court as settling the law of the case for its guidance upon a second trial, and, if so, it was not error to follow it, nor are we now required to enter upon a consideration of the grounds upon which the former opinion of this court was based."

If any other rule prevails, what becomes of the points decided by the circuit court of appeals which are not reversed by this court? Must the circuit court of appeals act upon the theory that if it is reversed on one point it is reversed

on all points? Certainly not; that would be an absurd conclusion.

If it is not reversed on certain points, must it again listen to argument on those same points, go again into the examination of those points at the suggestion or caprice of contending counsel, but certainly with no different result? If not, what must it do? It certainly ought to conduct its business on the theory that it is an appellate court; that points of law once decided by it are conclusive upon it; that it is no more incumbent upon it to again examine a question once decided by it than any other appellate tribunal, unless in the meantime it has been reversed by this court. Must it, contrary to the rule prevailing in every appellate court, examine, re-examine, examine again *ad infinitum* questions once clearly and fairly decided by it because, forsooth, it has been reversed on one point by the United States Supreme Court?

No other rule than the one for which we are contending is a safe or sensible one. No good argument can be advanced against it. On the contrary, the orderly administration of the practice in the circuit court of appeals, the saving of costs and expense to the litigants, the saving of time and trouble to this court, to the lower court, and to the circuit courts of appeals all demand it.

We think that when this court removes a case here from the circuit court of appeals by writ of certiorari, reverses it on one of a dozen points raised and urged in both courts and passes over the other eleven points in silence, by every rule of implication it affirms the circuit court of appeals; that the lower court, the circuit court of appeals, is justified in so regarding its silence; that the circuit court of appeals cannot with proper regard for its own decisions refuse to follow its decisions on points upon which it is not reversed or criticised. We have not the slightest doubt but that this court acted on this rule when it wrote the former decision in this case. An implied affirmance is just as binding on a court

as a direct affirmance, if it is clearly shown. The only difference is that one cannot be denied, the other rests on natural presumption from the facts of the case. We have only been able to find one case where this question has been discussed, where the question was the controlling effect of the first decision of an appellate court upon a second hearing when the first decision had been reviewed by a higher appellate court. It reaches the same result as the circuit court of appeals, as follows:

"It will not be necessary for us to make any further statement of the case or the facts therein than will be found in our former opinion, except only so far as there has been some little change of the facts and status of the case. The questions as to the sufficiency of the allegations of the petition and of the contract were passed on by this court when the case was formerly here, and when the case went to the Supreme Court no objection was found to that part of the opinion, and, as far as this court is concerned, these questions are *res adjudicata*, and we will refer to our former opinion for our decision on those points."

Kannake Co. *vs.* Crane Bros., 38 Ill. App. Cs., 555.

The following may be of some aid:

The court of appeals of Kentucky (Penticost *vs.* Ins. Co., 61 S. W., 29) states the rule in this language:

"We have on this appeal the identical case which was decided on the former appeal. Every point suggested and every argument now made could have been made at that time; and under a rule of long standing in this court the law as announced in that opinion is the law of this case. For the reasons indicated, the judgment is affirmed."

The synopses of the following cases may be of service to the court on this point:

"Where the same question was presented a second time, the appellee should have relied on the prior decision as *res judicata*."

Masterson *vs.* Chicago, R. I. & P. R. Co., 58 Mo. App., 572.

In Texas & P. R. Co. *vs.* Anderson, 149 U. S., 237; 37 L. Ed., 717, it was held that the "circuit court of appeals cannot review by writ of error a judgment of the circuit court made in compliance with the mandate of the U. S. Supreme Court."

Matters necessarily involved in the determination of a question on appeal are settled by the decision when the same are again presented on a subsequent appeal.

So the decision upon a prior appeal where the question presented on a second appeal was necessarily involved in the prior decision.

Hutchinson *vs.* Chicago R. R. Co., 41 Wis., 541.

And where the same questions were necessarily involved and the conclusions declared could not have been reached without either expressly or impliedly deciding such questions.

Ferguson *vs.* Smith, 104 Ind., 246.

And where the same question must have been considered upon the prior appeal.

Millbank *vs.* Jones, 51 N. Y. S. R., 616.

And where the same questions were expressly or by necessary implication decided on the first appeal.

McKinney *vs.* State, Nixon, 117 Ind., 26.

And where the same question was involved in the prior decision, although not discussed in such decision.

Joslin *vs.* Cowee, 50 N. Y., 626.

And where the same question was directly and expressly or by implication and in substance disposed of by such appeal.

Camden *vs.* Werninger, 7 W. Va., 528.

And where the same question was involved, although the case was reversed upon another question.

Adams *vs.* Fisher, 75 Tex., 657.

And where the prior decision was by the supreme court on a question reversed by the superior court, and the same question was involved or should have been presented.

New Haven & No. Co. *vs.* State, 44 Conn., 376.

And where the error alleged occurred prior to the former appeal. All errors not assigned will be considered as waived and cannot afterwards be urged.

Union Mut. Life Ins. Co. *vs.* Kirchoff, 149 Ill., 536.

And where the same question was involved and it was said that matters once determined could not be reopened, and this was true whether actually adjudicated or not. If they could have been adjudicated in that suit they were settled.

Carter *vs.* Hough, 80 Va., 503.

We think we have clearly demonstrated that the decision of the circuit court of appeals on the first hearing, on points not reversed or criticised by this court, was the law of the case on the second hearing in the circuit court of appeals. If that be true, it follows that the decision of the circuit court of appeals on those points is likewise the law of the case in this court. This court would not send this or any other case back to the lower court and leave points binding on it or the circuit court of appeals and not likewise binding on this court. Those courts would not be bound to do one thing and this court free to do another, when it had the opportunity to correct the matter on the first hearing. This court, we doubt not, had this matter in mind when the case was before it. We have no doubt, as we have argued, that this court intended that the circuit court of appeals

should understand and act on the assumption that it affirmed it on all points on which it was silent. When such is the declared rule of this court it will be easy for litigants and the lower courts and circuit courts of appeals to determine just what had become the law of the case. Any other rule will work inextricable confusion.

If this is true, every point now raised and urged has been disposed of, because they were all decided on the first hearing in favor of respondents.

We ask the court to affirm the decision of the circuit court of appeals.

S. WARBURTON.

EBEN SMITH,

HAROLD PRESTON,

Of Counsel.

EXHIBIT A.

OLYMPIA, WASHINGTON, *January 25th*, 1904.

This is to certify that I, the undersigned, am the official reporter of the decisions of the supreme court of the State of Washington; that I have examined the record and briefs in the case of Ella W. Griesemer, plaintiff and respondent, *vs.* The Mutual Life Insurance Company of New York, defendant and appellant, reported in 10 Washington, page 202.

The record shows that the case was tried in the lower court before the judge, without jury, who made his findings of fact and conclusions of law. In finding number "second" the court set out a copy of the policy, which, among other things, contained the following provision:

"Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute, is hereby expressly waived."

The same facts appear in reference to the case of Ella W. Griesemer, administratrix. On page 20 of appellant's brief in the first case mentioned this notice was set forth *in hæc verba*, and it was argued as follows:

"If the parties had the power to agree that the laws of New York should govern the contract, they certainly had the power to declare at the same time how far said contract should be subject to said laws."

In the reply brief, under point VII, pages 13–21, inclusive, the appellant argues in favor of the validity of the waiving clause above suggested, citing Insurance Co. *vs.* Curry, 13 Bush., 312; Des Mazes *vs.* Mutual Benefit Life Insurance Company, 7 Insurance Law Journal, 926; Endlich upon Interpretation of Statutes, sec. 444; Maxwell on Interpretation of Statutes, sec. 348.

On page 14, reply brief, appellant uses this language:

"The respondents contend that the clause in the policy waiving the law was absolutely nugatory."

"It is a familiar principle of statutory law that a person may waive the advantage of a statute which is solely for his benefit, providing that in doing so, he violates no public right or does not infringe upon public policy."

ARTHUR REMINGTON,
Official Reporter of the Decisions of the Supreme Court of the State of Washington.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that Arthur Remington is the official reporter of the decisions of the supreme court of the State of Washington; that I have read the foregoing statement by Arthur Remington and have compared the same with the records in said cases in so far as he undertakes to set forth copies of the records and briefs in said cases, and certify that each and all of said statements are correct copies of the official record and briefs filed in said cases.

Witness my hand and official seal this 25th day of January, A. D. 1904.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.